Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

FRANK J. WSOL, SR., HUGH M. CORCORAN, ROBERT N. FALCO, NEIL J. LONDON, CHARLES SCHMALZ, PHILLIP STANOCH, AS TRUSTEES OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION LOCAL NO. 710 PENSION FUND, AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION LOCAL NO. 710 PENSION FUND

Petitioners,

v.

FIDUCIARY MANAGEMENT ASSOCIATES, INC. AND EAST WEST INSTITUTIONAL SERVICES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

The Seventh Circuit accepted as fact that a fiduciary, in order to secure and keep a pension fund asset management contract, knowingly collaborated in a sophisticated securities kickback scheme with crooked trustees and a shady introducing broker. Despite presuming fiduciary breaches, the court did not award any remedy under ERISA § 409(a). In particular, the court limited one remedy, disgorgement, to two scenarios in which the breach "enables the fiduciary to make a profit through the [fiduciary's use] of assets of the plan." 266 F.3d at 658, (App. A., *infra*, pp. A-5, 6), quoting 29 U.S.C. § 1109(a). These situations are a fiduciary's: (a) "appropriating plan assets", or (b) "investing [plan assets] in a risky fashion in order to maximize his fee." *Id.* at 658. In the court's view, the availability of a remedy is not influenced by the nature and degree of the fiduciary's treachery, in the absence of (a) or (b). **The questions presented are:**

1. **Does ERISA § 409 afford any remedy to a fiduciary, participant, beneficiary or the Secretary of Labor to redress the fiduciary misconduct assumed by the Seventh Circuit?**

and

2. **Is disgorgement of profits or fees under ERISA § 409 limited to the two scenarios identified by the Seventh Circuit?**

PARTIES TO THE PROCEEDING

The named appellants in the United States Court of Appeals for the Seventh Circuit were Frank J. Wsol, Sr., Hugh M. Corcoran, Robert N. Falco, Neil J. London, Charles Schmalz, and Phillip Stanoch, as Trustees of The International Brotherhood of Teamsters Union Local No. 710 Pension Fund, and the International Brotherhood of Teamsters Union Local No. 710 Pension Fund (the "Pension Fund" or "Fund"). At the time of the filing of the complaint in this case, Frank J. Wsol, Sr., Hugh M. Corcoran, Robert N. Falco, Neil J. London, Charles Schmalz, and Phillip Stanoch, were the Trustees of the Pension Fund, which is a multi-employer employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, as amended. At the time notices of appeal were filed, Hugh M. Corcoran continued to serve as a trustee. By the time appellate briefs were filed, he had been replaced by James Dawes.

Appellees in the Seventh Circuit were Fiduciary Management Associates, Inc. and East West Institutional Services, Inc. Fiduciary Management Associates, Inc. was a wholly owned subsidiary of United Asset Management Corporation which, in turn, was a wholly owned subsidiary of Old Mutual plc, a publicly traded company. East West Institutional Services, Inc. was privately held and was a subsidiary of East West Group. It did not file an appellate brief.

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, p. A-1) is reported at 266 F.3d 654 (7th Cir. 2001). The opinion of the district court granting defendants' Fed. R. Civ. P. 52(c) motion (App. B, *infra*, p. B-1) is available at 2000 U.S. Dist. LEXIS 955 (N.D. Ill. January 28, 2000) (unreported). The opinion of the district court denying plaintiffs' Motion for New Trial or Relief from Judgment (App. C, *infra*, p. C-1) is available at 2000 U.S. Dist. LEXIS 7546 (N.D. Ill. May 30, 2000) (unreported). The minute order of the district court, dated June 15, 2000, denying plaintiffs' Motion for Reconsideration of (1) the court's denial of plaintiffs' Motion for New Trial or Relief from Judgment and (2) the court's judgment on partial findings (App. D, *infra*, p. D-1) is unreported. There was no accompanying memorandum opinion. The opinion of the district court denying plaintiffs' second Motion for New Trial (App. E, *infra*, p. E-1) is available at 2001 U.S. Dist. LEXIS 3414 (N.D. Ill. March 19, 2001) (unreported).

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2001 (App. A, *infra*). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the Employee Retirement Income Security Act of 1974, including 29 U.S.C. §§ 1104 - 1106, 1108, 1109 and 1132. Each is set forth in Appendix F.

STATEMENT OF THE CASE

Petitioner, the International Brotherhood of Teamsters Local No. 710 Pension Fund ("Pension Fund" or "Fund"), a Chicago-based Taft-Hartley plan with over 21,000 participants and beneficiaries, retains professional financial advisers to invest and manage much of its approximately $1.5 billion in assets. Respondent, Fiduciary Management Associates, Inc. ("FMA"), served the Pension Fund in this capacity from June 18, 1994 to January 1999. Throughout its

tenure as a Fund investment manager, FMA assumed fiduciary responsibilities imposed by the Employee Retirement Income Security Act of 1974 ("ERISA"), as well as other duties. The Pension Fund allocated over $350 million to FMA to manage.

I. The Felonious Kickback Scheme

In the trial and appellate proceedings below, the Pension Fund complained of FMA's undisclosed participation in a corrupt kickback scheme. It alleged that this criminal scheme, once implemented, converted Fund assets to further FMA's selfish, profit-minded interests — a prototypical fiduciary breach. The court of appeals accepted, *arguendo*, that FMA breached fiduciary duties. Nevertheless, it concluded that 29 U.S.C. § 1109 afforded no remedy for, what it termed, FMA's "skullduggery". *FMA*, 266 F.3d at 657. (App. A, *infra*, p. A-3.)

The felonious scheme, which later unraveled and resulted in a RICO indictment and guilty pleas, centered around the relationship of FMA and other Fund managers with East West Institutional Services, Inc. ("East West"). The Seventh Circuit used the phrase "scandalous provenance" to describe the relationship between FMA and East West. *FMA*, 266 F.3d at 657. (App. A, *infra*, p.A-4.) It is a fitting description.

East West acted as an introducing broker on trades made by FMA on the Fund's portfolio. It was an intermediary between brokers executing securities trades, on the one hand, and FMA, which placed buy and sell orders, on the other. East West kicked back part of its brokerage fees or commissions to two of the Pension Fund's trustees, who steered FMA to East West.[1] The kickbacks formed the gravamen of the criminal charges against the corrupt trustee and East West's principals.

It bears repeating that the court of appeals assumed FMA's complicity in the kickback scheme and accepted

[1] After trial, the kickback scheme came to light with the indictment of former Fund trustee, William Close, and the principals of East West. A deceased trustee was also identified as a participant in the kickback scheme, but was not formally indicted because of his death.

allegations detailing the complicity as true. For example, the court indicated that "FMA treated the trustee later unmasked as a crook to expensive golf outings and hired East West as its introducing broker in order to curry favor with him." *FMA*, 266 F.3d at 656. (App. A, *infra*, p. A-3.) And curry favor FMA did, to the tune of $4.88 million in fees and $3.56 million in profits for managing the Pension Fund's portfolio.

II. East West's Shady Principals and Operation

The Fund also maintained FMA was obligated to investigate East West under ERISA's "prudent man" standard before using East West's services. It didn't. According to the Fund, had FMA spent a modicum of effort canvassing largely public information, it would have learned that East West's principals, Christopher Roach and Richard Tringale, were, as the Court of Appeals put it, "shady". *FMA*, 266 F.3d at 656. (App. A, *infra*, p. A-3.) They had checkered, discipline-marred histories in the securities industry. *See, for example,* Seventh Circuit Case No. 2703 (first appeal), S. App. 105-109. *See also, S.E.C. v. Sendo,* Fed. Sec. L. Rep. (CCH) P96,117 (S.D.N.Y. 1991) (Tringale's assets were frozen for participating in a securities fraud scheme). These histories would have warned any disinterested investigator that East West was unsuited for service to an ERISA fund.

FMA would have also discovered that East West was little more than a "mailbox" operation, *FMA*, 266 F.3d at 656, (App. A, *infra*, p. A-3), with virtually no assets and even less ability to independently compile valuable market research. As the Fund asserted below, discovery and disclosure were not in FMA's selfish economic interests and were not contemplated by the kickback conspirators. Again, the Seventh Circuit's opinion credits the Fund's allegations.

III. The Ensuing Lawsuit

On March 15, 1999, the Pension Fund sued FMA in the U.S. District Court for the Northern District of Illinois, *citing* 29 U.S.C. § 1132(f) and 28 U.S.C. § 1367 as jurisdictional bases. The Fund alleged numerous ERISA transgressions, includ-

ing violations of 29 U.S.C. §§ 1104 and 1106. Self-dealing and disloyalty were two of the primary accusations leveled against FMA.

Conceptually, the Fund complained its assets fueled or financed the kickback scheme. It unwittingly paid a surcharge on trades brokered by East West, equal to East West's commissions, and received nothing of value in exchange. Put another way, the Fund charged that FMA, in fact, directed brokerage to East West without proper approval.[2] Tracking the remedies language of ERISA § 409(a), the Fund sought redress for its losses, including the commission money transferred to East West, approximately $2 million. Additionally, the Fund specifically requested recovery of FMA's profits.

A bench trial began on January 14, 2000. At the close of the Pension Fund's proofs, the district court entered a judgment on partial findings in favor of FMA, pursuant to Fed. R Civ. P. 52(c). The presiding judge found no evidence of fiduciary breach by FMA. (App. B, *infra*, pp. B-10 through 13.) The district court also found no evidence of prohibited transactions. (App. B, *infra*, pp. B-18 through 19.) On the directed brokerage accusation, it disregarded testimony by FMA's own principal trading and compliance officers. Both acknowledged *de facto* directed brokerage. (Meyer, TR 284-285; Thornburgh, TR. 397 - 398, 437 - 438, 458, 461.) This testimony was dismissed as semantical confusion. (App. B, *infra*, p. B-16.) And the district court found no compensable loss. (App. B, *infra*, pp.B-10, 11.) It reasoned that the 6 cents per share paid by the Pension Fund on trades "introduced" by East West was "as good as what it could have bought in a market free of kickbacks and undue influence." *FMA*, 266 F.3d at 657. (App. A, *infra*, p. A-4.)

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[2]When brokerage is directed, an institutional investor selects the executing broker without regard to best execution. In exchange, the investor must receive reasonable consideration: market research or a commission rebate. *See* 15 U.S.C. § 78bb(e) and D.O.L. ERISA Technical Release 86-1. At trial, FMA stipulated that documents putatively "authorizing" FMA's directed brokerage relationship with East West "were not made by the person whose signatures they purport[ed] to be." (TR 634-637).

To reach this conclusion, the district judge was forced to reconcile competing testimony. The Pension Fund's expert, Steven A. Berkowitz, was considered "well-qualified" by the trial court. (App. B, *infra*, p. B-9.) He testified the research supplied by East West was not valuable to FMA because it was duplicative and dated. FMA's Chief Compliance Officer, Richard Thornburgh, also stated that FMA did not claim East West's $2,000,000 in commissions was a reasonable, good faith judgment of the research's value. (Thornburgh, TR. 399, 452-453.) The district judge discounted Mr. Berkowitz's testimony. The court instead credited the hearsay testimony of FMA's CEO, Robert "Todd" Carr, (App. B, *infra*, pp. B-9, 10), despite what the district court called his "hazy and unreliable" testimony on other matters. (App. B, *infra*, p. B-12.)

IV. Post-Trial Motions Based Upon Criminal Proceedings

The U.S. Justice Department and the S.E.C. also investigated clandestine brokerage arrangements with East West. Shortly after the district court's Rule 52(c) judgment, a federal grand jury named former trustee William Close and East West's Roach and Tringale in a racketeering/money laundering indictment. Informed of the indictment in a combined (and later supplemented) Fed. R. Civ. P. 59(a)/Fed. R. Civ. P. 60(b) motion, the district court denied post-judgment relief ostensibly because the indictment contained mere allegations. (App. C, *infra*, p. C-10.) Close then pled guilty to 13 counts of the indictment, acknowledging he received kickbacks from East West. Post-trial relief was again denied, this time without opinion. (App. D, *infra*.)

Finally, Roach and Tringale entered guilty pleas to RICO and money laundering counts in the indictment. Contingently settling Fund claims, Roach later provided an affidavit detailing FMA's knowing and active participation in the forbidden kickback scheme. This affidavit was submitted by the Fund to the district court, along with another new trial motion. (R. 104.) Roach confirmed the alleged *quid pro quo*. As he explained, FMA directed plan assets (*i.e.*, brokerage commissions) to East West in exchange for getting and

keeping the Fund's business. (Roach Affidavit, ¶ 3.) Then, with FMA's knowledge, East West kicked back payments to the rogue trustees. *Ibid.* It was agreed that this arrangement would be concealed from the Fund. *Ibid.* Roach's affidavit further indicated that Carr actively recruited others into the racketeering scheme. (Roach Affidavit, ¶¶ 6 & 7.)

For a third time, the district court denied the post-judgment relief requested by the Fund. (App. E, *infra.*) The trial judge said that Roach was not "unquestionably" credible, even though she never saw or heard him testify. (App. E., *infra*, p. E-7.) Roach's credibility (or lack thereof) apparently could be satisfactorily assessed from the four corners of his affidavit. The Fund readily admits that Roach's affidavit flatly contradicts his earlier deposition testimony (denying the kickback scheme). However, as the Fund unsuccessfully argued to the trial judge, witnesses frequently recant prior testimony after entering criminal pleas and promising cooperation with Justice Department officials.

V. Appeals

The Fund appealed to the Seventh Circuit — twice. The initial appeal framed a number of issues, including the propriety of a disgorgement remedy as a consequence of FMA's self-dealing and disloyalty. The second appeal followed the district court's treatment of the Roach affidavit and its resolution of the Fund's accompanying post-trial motion. The appeals were then consolidated.

The Seventh Circuit did not meaningfully discuss or decide the many liability and procedural issues raised on appeal. It streamlined the analysis. Even if the district court was "wrong" on liability, and even if the newly-discovered evidence of "skullduggery" was credible and established a "very serious breach" of fiduciary duty, the Seventh Circuit found no basis for fashioning a remedy under ERISA § 409 and corresponding case law. *FMA*, 266 F.3d at 657-658. (App. A., *infra*, p. A-3, 5, 6.) Relief was withheld even though the court assumed "FMA [would] not have gotten the Fund's business had it not retained East West as introducing broker."

FMA, 266 F.3d at 658. (App. A., *infra*, p. A-5.) Relief was withheld even though "FMA knew about the crooked relationship between East West and ... [rogue] trustees." *FMA*, 266 F.3d at 658. (App. A., *infra*., p. A-5.) The court prefaced its analysis with these words:

> The [consolidated] appeals raise a number of questions, but one is dispositive and **so we ignore the rest.** The plaintiffs cannot prevail unless the breach of fiduciary duty either imposed a loss on the plan or generated a profit for FMA "through the use of assets of the plan" by FMA. 29 U.S.C. § 1109(a); *Leigh v Engle*, 727 F.2d 113, 121-122 (7th Cir. 1984); *Etter v. J. Pease Construction Co.*, 963 F.2d 1005, 1009-1010 (7th Cir. 1992); *Felber v. Estate of Regan*, 117 F.3d 1084, 1087 (8th Cir. 1997); James F. Jorden *et al., Handbook on ERISA Litigation* 3-104 to 3-106 (2d ed., Supp. 2000). If the former, they are entitled to damages, and if the latter, to the recovery ("disgorgement as the cases call it) of FMA's profit on the theory of unjust enrichment or, equivalently, constructive trust, a standard remedy against malfeasant fiduciaries. **The plaintiffs have not established a basis for either remedy, however, and so they lose.**

FMA, 266 F.3d at 656 (boldface added). (App. A, *infra*, p. A-2.)

The Seventh Circuit then bifurcated its analysis to separately address the Fund's loss claim (and prayer for compensatory damages) and the Fund's claim to FMA's profits or fees.

A. Loss Analysis

The Seventh Circuit concluded the Fund suffered no compensable "loss". The court's reasoning is essentially two-fold. First, the Seventh Circuit deferred to the District Court's finding that prevailing market conditions dictated the Fund pay 6 cents per share for its trades, the same price charged to the Fund.

Second, the court determined FMA did not direct brokerage to East West because directed brokerage had not been authorized by the Fund's trustees. The Seventh Circuit never squarely addressed the Fund's charge that FMA installed a ***de facto*** directed brokerage arrangement, unknown to Fund trustees, evidenced by (1) the testimony of FMA officials, (Meyer, TR 284-285; Thornburgh, TR. 397 - 398, 437 - 438, 458, 461), and (2) the fact that East West benefitted from over 90% of FMA's trades on the Fund's portfolio.

B. Analysis of Profits and Fees

As previously stated, the Seventh Circuit initially assumed "FMA [would] not have gotten the fund's business had it not retained East West as an introducing broker...." *FMA*, 266 F.3d at 658. (App. A., *infra*, p. A-5.) "But this[,]" the court explained, "is just to say that if the evidence is believed, **FMA committed a very serious breach of its fiduciary duty[,]**" *ibid.* (boldface added), a breach without a remedy, it turns out. As the court further explained, "the Fund was not harmed and FMA obtained no greater profit than it would have obtained had it not retained East West." *Ibid.*

Serious or not, the court refused to remedy FMA's assumed breach. In a seminal passage, the court added:

> The remedy of disgorgement is limited to cases in which the breach of the fiduciary obligation enables the fiduciary to make a profit "through [the fiduciary's] use of assets of the plan. The kind of misconduct contemplated is the fiduciary's appropriating plan assets or investing them in a risky fashion in order to maximize his fee.

Ibid. Finding no misconduct of this sort, the court's reasoning essentially stops here. With this passage, the Seventh Circuit evidently limits disgorgement to the examples it cites: appropriating plan assets or investing in a risky fashion to maximize fees. According to the court, selection and retention as an asset manager, with the attendant opportunity to generate and realize profits, is somehow not itself a profit,

per se, and does not entitle a fund to the equitable remedy of disgorgement under ERISA § 409, kickbacks and felonious conduct notwithstanding. *Ibid.*

REASONS FOR GRANTING THE WRIT

I. Overview

Crediting the Fund's evidence, *arguendo*, the Seventh Circuit believed FMA would "not have gotten the fund's business had it not retained East West as introducing broker." *FMA*, 266 F.3d at 658. (App. A, *infra*, p. A-5.) Nevertheless, the court reasoned that FMA did not profit. Getting and keeping the business (*i.e.*, millions in fees) strikes the Fund as a quintessential profit and disgorgement should have been ordered. The court instead limited disgorgement to two scenarios: a fiduciary's appropriation of plan assets or a fiduciary's investment in a risky scheme to maximize fees. Finding neither here, relief was refused. *FMA*, 266 F.3d at 658. (App. A, *infra*, p. A-6.) But because it earlier recognized that disgorgement is the remedy for unlawful profits, *ibid.*, the Seventh Circuit effectively defined the term "profits" in ERISA § 409(a), 29 U.S.C. § 1109(a), to mean appropriation of plan assets or risky investment of plan assets to maximize fees. This definition is unprecedented and inconsistent with ERISA's legislative goals and history.

Denying that FMA profited and, thus, refusing to order disgorgement, the Seventh Circuit handicapped ERISA's enforcement from a much larger perspective. Since disgorgement is a form of equitable relief, the court modified the phrase "other equitable or remedial relief" in ERISA § 409(a). Additionally, it overlooked Congress' instruction that breaching fiduciaries "shall be subject to such relief [.]" As a consequence of the Seventh Circuit's decision, § 409(a) now effectively reads "equitable or remedial relief may be available if plan assets are appropriated or used in risky investments to maximize his fees." Even participation in undisclosed kickback schemes — a first degree fiduciary breach that runs to the very core of ERISA and the law of

trusts — warrants no relief in the Seventh Circuit's view. Fiduciary malfeasance goes unpunished and is thus encouraged.

This wayward result promotes uncertainty. Where ERISA's broad remedies had once been (seemingly) mandated and unquestionably dispensed, the Seventh Circuit's decision invites reconsideration and engenders confusion on many levels. For instance, the decision conflicts in principle with several United States Supreme Court decisions. Disgorgement of a disloyal fiduciary's gains has been ordered by this Court as far back as 1910. *United States v. Carter*, 217 U.S. 286 (1910). And, in the more modern context of ERISA, this Court indicated disgorgement is a compulsory remedy under ERISA § 409(a) for ERISA § 406 violations. *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993).

Disgorgement originates in the common law of trusts, which this Court frequently references to interpret ERISA liability and remedies. The Seventh Circuit did not consult this rich source of law, furthering its departure from the Supreme Court.

The conflict does not end with Supreme Court authority. Decisions from sister circuit courts cannot be reconciled in principle with the Seventh Circuit's decision. *See, GIW Industries v. Trevor, Stewart, Burton & Jacobson, Inc.*, 895 F.2d 729 (11th Cir. 1990), *affirming*, 10 E.B.C. 2290 (S. D. GA 1989); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209 (2nd Cir. 1987); and *Amalgamated Clothing and Textile Workers Union v. Murdock*, 861 F.2d 1406 (9th Cir. 1988). In one, a fiduciary guilty of nothing more than purchasing the wrong kind of bond was ordered to disgorge its approximately $17,000 fee, despite his good faith. *See, GIW*, 10 E.B.C. 2290, Conclusions of Law, ¶ 26, *aff'd*, 895 F.2d 729. Yet here, the disloyal fiduciary caught in a kickback scheme (*i.e.*, FMA) keeps its millions in fees. In another case, the court cautions against creating a loophole for kickbacks in the course of interpreting the term "plan assets" in another ERISA section. *Lowen*, 829 F.2d at 1215. Yet here, a kickback loophole is created. In the third case, the court wanted to deter disloyal conduct and a constructive

trust was imposed even though the plan beneficiaries already received all vested benefits. The court simply would not permit the fiduciary's unjust enrichment, *Murdock*, 861 F.2d at 1417. Yet here, in an odd twist, the Seventh Circuit expressed a concern at oral argument about the Fund receiving a windfall, rather than focusing on the enrichment of the disloyal fiduciary.[3]

Confusion and discord manifests in other ways. Unless reversed, the Seventh Circuit's ruling will severely and incalculably upset the interplay with other carefully reticulated provisions in ERISA. For example, the decision may make it incumbent on a Fund to immerse itself in Wall Street complexities to prevent similar asset manager abuses. If so, this result undercuts ERISA § 405(a), which permits the appointment of asset managers like FMA and relieves trustees of the duty to manage assets entrusted to appointed asset managers.

And where suspicion of fiduciary abuse and disloyalty is, in fact, confirmed, co-fiduciaries responsible for enforcing ERISA and redressing misconduct may be deterred from filing suit because they cannot confidently recover profits under the Seventh Circuit's restrictive interpretation of ERISA § 409. In other words, a fiduciary's duty to defray expenses and costs under 29 U.S.C. § 1104(a)(1)(A)(ii) may counsel against litigation. Of course, the Secretary of Labor is also empowered to bring suit. But, in the Seventh Circuit, the Department of Labor will apparently lack certain equitable remedies just like private litigants.

Finally, a fundamental analytical flaw by the Seventh Circuit upsets the dynamic of other ERISA provisions. The court's opinion assumes FMA's role in the kickback scheme and the *quid pro quo* outlined above. By extension, it neces-

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[3]The Seventh Circuit's directed brokerage analysis is also at odds with a recent S.E.C. administrative order. *See, In re Duff & Phelps Investment Co., Inc.*, File No. 3-10606 (order dated 9/28/2001). The agency concluded that another investment manager (Duff & Phelps), conspiring with East West and the corrupt trustee(s) in an identical kickback scheme, did in fact direct brokerage to East West without disclosure to the Fund.

sarily assumes FMA's part in ERISA § 406(b)(1) and (b)(3) violations. Both provisions predicate liability on the use of plan assets. Yet, irreconcilably (or so it would appear), the opinion denies a remedy under ERISA § 409 because the use of plan assets wasn't shown. The court created an internal conflict: it found plan assets were used to establish liability, but denied any remedy because plan assets were not used.

II. The Seventh Circuit's Decision Constricts ERISA Enforcement Provisions, Portends Significant Practical Harm and Contradicts *Mertens* and Other Precedent

ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (*quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)). To achieve this goal, "Congress included [in ERISA] various safeguards to preclude abuse and to completely secure the rights and expectations brought into being by this landmark reform legislation." *Ingersoll-Rand*, 498 U.S. at 137 (internal quotation and citation omitted).

ERISA's civil enforcement provisions, found in Section 502(a) of the statute, 29 U.S.C. § 1132(a), are "essential tools for accomplishing the stated purposes of ERISA." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987). ERISA § 502(a)(2) authorizes civil actions by fiducaries, the Secretary of Labor and others "for appropriate relief under section 409 [29 U.S.C. § 1109]". ERISA § 409(a), in turn, states:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

> A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. § 1109(a).

Here, the Seventh Circuit misconstrued and misapplied the term "profits". Because disgorgement is an equitable remedy to recover profits, the court, by extension, also modified the clause "or such other equitable or remedial relief ...." These errors are discussed separately below for clarity. But they are components or elements of a single overarching error, namely: the court's denial of any ERISA § 409(a) relief. The Fund contends that FMA's disloyalty warranted relief under the restoration of profits clause, under the other equitable and remedial relief clause, or both.

Ultimately, the Fund's position presents an *"if - then"* proposition. *If* FMA knowingly collaborated with crooked trustees in a kickback scheme (as the Court of Appeals assumed), *then* relief should have been afforded under one or more of ERISA § 409(a) provisions. In fact, relief should not depend on the nature of a fund's request (although, the Fund maintains its request for disgorgement below derived from the restoration of profits clause and the other equitable or remedial relief clause of § 409(a)). As stated, in *Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984), "[c]ourts have a duty 'to enforce the remedy which is most advantageous to [trust fund] participants and most conducive to effectuating the purposes of the trust.'" *Id.* at 1235, *quoting Eaves v. Penn*, 587 F.2d 453, 462 (10th cir. 1978). *Eaves*, in turn, referenced the common law of trusts for the following rule: even in the absence of "an election of a particular remedy ..., the court has a duty to enforce [the most advantageous remedy]." 587 F.2d 462, *citing Restatement (Second) of Trust*, § 214.

The Seventh Circuit's decision does not account for a court's independent duty to enforce an advantageous remedy. If the Fund is entitled to no remedy for FMA's egregious conduct, an authoritative pronouncement from the Supreme Court is needed to remove all doubt.

A. FMA Used Plan Assets to Profit from the Clandestine Arrangement

By limiting disgorgement to two scenarios (*i.e.* a fiduciary's appropriation of plan assets or a fiduciary's risky investment of plan assets to maximize fees), the Seventh Circuit effectively defined "profits" in this same way. In the court's view, recoverable "profits" under ERISA § 409(a) only derive from appropriation of plan assets or risky investment of plan assets to maximize fees. The Fund equates disgorgement with profits because the court linked disgorgement to profits in its opinion. *FMA*, 266 F.3d at 656. (App. A, *infra*, p. A-2.) The Seventh Circuit's interpretation is unprecedented.

As stated (and as the Seventh Circuit accepted as true), FMA secured and retained the Fund's business by using East West. *FMA*, 266 F.3d at 658. (App. A, *infra*, p. A-5.) Equally important, FMA received a quarterly fee from the Pension Fund equal to a flat percentage of Fund assets entrusted to FMA's management. FMA's fee then, is directly linked to Fund assets. To accept the fee, while directing brokerage to East West as part of an illegal kickback scheme, again strikes the Fund as quintessential appropriation — or, more precisely, misappropriation.

Fund assets not only compensated FMA, they drove or fueled the entire kickback scheme. When a trade involving the Fund's portfolio was ordered and later executed, the Fund's custodial bank would be contacted and Fund money would be wired to the clearing brokers to cover transaction costs. Much of this money was ultimately credited to an East West account as a "commission" through the use of prearranged account number markers. (Appeal No. 2703 - PX 30, 54; Mayer, Tr. 785; Muncie Dep. Sum., 2.) East West, in turn, paid off William Close, the orchestrating trustee, and a second (now deceased) trustee, who made sure FMA kept the Fund's business. (Appeal No. 01-1685 - R. 104, Roach Decl. ¶ 2.)

The Seventh Circuit does not explain why Fund assets were not used in the kickback scheme. It can't because it pre-

viously assumed FMA's role in ERISA §§ 406(b)(1) and (b)(3) violations. Both of these sections predicate liability, in part, on the use of plan assets. Under (b)(1), a fiduciary may not "deal with the assets of the plan in his own interest... ." 29 U.S.C. § 1106(b)(1). And under (b)(3), a fiduciary may not receive consideration for his own personal account... in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(3). How is it that plan assets were necessarily involved to establish liability, but not involved when considering relief? This inconsistency clouds the Seventh Circuit's analysis.

The Supreme Court is urged to reconcile this apparent anomaly. Its intervention is needed to guide pension plan fiduciaries and administrators tomorrow. To conclude FMA did not appropriate Pension Fund assets simply strains logic to the breaking point.

B. The "Other Equitable or Remedial Relief" Clause is Modified

Because disgorgement is an equitable remedy to prevent unjust enrichment, *see* 1 Dan B. Dobbs, *Law of Remedies* § 4.1(1) at 552 (2d ed. 1993); and the Seventh Circuit's own opinion, 266 F.3d at 656, (App. A, *infra*, p. A-2), the court's conclusion significantly restricts "the equitable or remedial relief" clause of ERISA § 409 and, by extension, similar clauses in §§ 502(a)(3) and 502(a)(5)(authorizing fiduciaries, participants and the Secretary of Labor to bring civil actions to "obtain other appropriate equitable relief"). Indeed ERISA §§ 502(a)(3) and 502(a)(5) act as "safety net[s]", ensuring appropriate equitable relief is available for ***all*** ERISA violations. *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996).

Equitable or remedial relief is compulsory, not optional or conditional. Congress meant what the phrase, "and shall be subject to such ... relief", says. 29 U.S.C. § 1109(a). True, Congress added the qualifier, "as the court may deem appropriate", to this phrase. *Ibid.* But, "appropriate" cannot be read, in the Fund's view, to mean relief is completely optional, conditional, or discretionary. Otherwise, why did Congress use

the term "shall" in the first place? If Congress truly intended optional relief, the logical phrasing would have been "and may be subject to such ... relief[.]"

In the Fund's view, the term "appropriate" in ERISA § 409(a) generally reserves a role to decide which form of relief best redresses a fund's injury. A court is best equipped to tailor a remedy to match the facts of a given case. The term "appropriate" does not, however, authorize a court to withhold relief altogether. *See Mertens*, 508 U.S. and 249, which compels disgorgement of profits gained in prohibited transactions. The Supreme Court is encouraged to grant a writ of certiorari and confirm or reject this view to aid lower courts and ERISA practitioners.

The Fund's view gives meaning to each word chosen by Congress. Because ERISA is a "comprehensive and reticulated statute, *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980), the Supreme Court has repeatedly and unequivocally declined to modify the words Congress chose. *See, e.g., Mertens*, 508 U.S. at 257-258 (1993). Undeniably, courts are to construe statutes by examining the text first. *Id* at 261. The Seventh Circuit neglected this cardinal canon of construction. Its opinion effectively amends ERISA § 409 by overlooking the phrase "other equitable or remedial relief" and Congress' instruction that such relief shall be afforded. Equally disconcerting, the Seventh Circuit's statutory review failed to "look to the provisions of the whole law, and to its object and policy." *Id.* at 94-95, *quoting Kelly v. Robinson*, 479 U.S. 36, 43 (1986)(internal quotation marks omitted). This failure resonates throughout this petition.

Arguably the Fund's position raises an issue of statutory redundancy: if profits can be recovered without showing a use of plan assets under the equitable relief clause, isn't the phrase "to restore... profits... made through use of assets of the plan" superfluous? Maybe, but if so, the Fund urges the Court to decide this case on the merits and resolve what may appear to be a case of two evils: a potentially superfluous interpretation of § 409(a) versus eliminating disgorgement as a remedy for the egregious behavior of a disloyal fiduci-

ary. The Fund submits the former is, by far, the lesser evil, particularly if "equitable relief" acts as a "safety net", at least under ERISA § 502(a)(3). *See Varity*, 516 U.S. at 512. *Accord Donovan v. Mazzola*, 716 F.2d at 1235, where the court backed remedies "most advantageous to the participants."[4]

C. The Seventh Circuit's Decision Conflicts with the Reasoning of *Mertens*

ERISA's remedial scheme is familiar to this Court. On at least three occasions since 1992, this Court interpreted ERISA § 502(a)(3), mindful of Congress' intent to protect the interests of plan participants and beneficiaries. *See Mertens*, 508 U.S. at 261; *Varity*, 516 U.S. at 511-513; and *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241-242 (2000). This case marks an important distinction because ERISA § 409 is front and center, not § 502(a)(3). Here, fiduciaries sued co-fiduciaries for violations of ERISA §§ 404 and 406 to compensate the Fund.

Mertens is an appropriate starting point for illustrating a conflict in principle because, on its face, the Seventh Circuit's decision ignores an unqualified command in *Mertens* to order disgorgement of FMA's profits or fees. To elaborate, *Mertens* questioned whether a "nonfiduciary who knowingly participates in the breach of a fiduciary duty imposed by [ERISA] is liable for the losses suffered as a result of the breach." 508 U.S. at 249. This Court denied relief for the losses sustained.

However, the petitioners sought to recover from **nonfiduciaries.** The holding does not apply to **fiduciaries**, like FMA, a determinative distinction this Court drew:

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[4]A court might interpret the phrase "profits... made through use of assets of the plan" to apply to cases where the breaching fiduciary mixes personal assets with fund assets to profit. Accordingly, the phrase "profits... made through use of assets of the plan" may prescribe a rule of apportionment to bar a fund's windfall recovery of profits generated from a fiduciary's own, personal assets. Here, there is no suggestion FMA commingled its assets with Fund assets; therefore, the phrase "profits... made through use of assets of the plan" is not triggered and an equitable remedy of disgorgement is appropriate.

> ... ERISA ... defines "fiduciary"... in *functional* terms of control and authority over the plan, see 29 U.S.C. § 1002(21)(A), thus expanding the universe of persons subject to fiduciary duties – **and to damages – under § 409.** Professional service providers such as actuaries become liable for damages when they cross the line from adviser to fiduciary; [and] **must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406... .**

508 U.S. at 262 (italics in original; boldface added). Disgorgement of FMA's profits or fees, according to this Court's pronouncement, **must** be ordered. There are no qualifications. There is no discretion.[5]

1. *Mertens* is Faithful to the Text of ERISA § 409

The text of ERISA § 409(a) justifies disgorgement as a mandatory, compulsory remedy for prohibited transactions. As previously noted, ERISA § 502(a)(3) provides equitable relief. § 409(a) also prescribes "remedial" relief in addition to equitable relief because "'the crucible of congressional concern was the misuse and mismanagement of plan assets', particularly self-dealing by plan managers [*i.e.*, fiduciaries]." *Lowen*, 829 F.2d at 1213, *quoting Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n. 8 (1985)(discussing legislative history).

It stands to reason Congress would arm courts in § 409(a)

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[5] The term "profits" is often used interchangeably with the term "fees", although the former means net income, that is, net of expenses. The Pension Fund is also guilty of interchanging these terms below. Because *Mertens* speaks of disgorging "assets and profits", 508 U.S. at 262, and because the Seventh Circuit appreciated the distinction between fees and profits when it addressed the two terms, *FMA*, 266 F.3d at 658, (App. A, *infra*, p. A-5), the Fund does not limit its argument to either profits or fees. Alternative arguments for profits and fees were preserved below. Thus, the Fund seeks the maximum recovery under ERISA § 409(a), be it profits or fees. If the statutory construction of § 409(a) denies recovery of profits, but not fees, then the Fund seeks fees, and *vice-versa*. *See Donovan v. Mazzola*, 716 F.2d at 1235 (legislative history of ERISA favors a remedy "which is most advantageous").

with something more than equitable remedies because equitable relief is not limitless. As noted in *Mertens*, "[e]quitable relief must mean *something* less than *all* relief." 508 U.S. at 259, n.8 (emphasis in original). The "something more" Congress provided was "remedial" relief. As further noted in *Mertens*, the distinction between equitable and remedial relief cannot be considered meaningless. *Ibid.* By combining equitable relief with remedial relief, Congress meant to span the entire spectrum of relief. Where equitable relief ends, remedial relief picks up. Put another way,

> [i]f Congress did not include the catchall relief provision in ERISA § 409(a) to allow courts to remedy unforseeable [sic] methods of misus[ing] and mismanag[ing] plan assets... [,] then it is difficult to imagine why Congress included a catchall provision in § 409(a).

Murdock, 861 F.2d at 1416 (internal quotes omitted; second ellipse added).[6]

2. *Mertens* Addressed ERISA § 406 Violations Like Those Assumed Here

Mertens predicated mandatory disgorgement on violations of ERISA § 406, codified at 29 U.S.C. § 1106. Here, the Fund alleged several ERISA § 406 (a) and (b) violations.

Congress adopted § 406(a) to prevent transactions that previously had benefitted others at the expense of plan participants and beneficiaries. *Reich v. Compton*, 57 F.3d 270 (3rd Cir. 1995). The transactions categorized in § 406(a) are presumptively not engaged at arm's length, resulting in *per se*

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[6] In the aftermath of *Mertens*, at least one circuit court held that ERISA § 502(a)(3) provides a cause of action against a nonfiduciary party in interest when such party participated in a kickback scheme prohibited by ERISA § 406(b)(2) and (b)(3). *Leblanc v. Cahill*, 153 F.3d 134, 153 (4th Cir. 1998)(addressing an issue left open in *Mertens*). The Fourth Circuit also held that disgorgement of profits and gains "falls squarely within the [*Mertens*] definition of 'appropriate equitable relief' as stated in ERISA § 502(a)(3)." *Ibid.* Here, the Pension Fund makes a stronger case for disgorgement because it relies on the broader relief of ERISA § 409(a) in an action against a fiduciary.

prohibition. *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993). Injury is presumed, precisely why *Mertens* demands a remedy.

The same reasoning holds true for § 406(b), which prohibits transactions deemed deleterious by virtue of their "character and consequences." *See*, Woodruff, *ERISA Law Answer Book*, Q 7:4, p. 7-5 (Aspen Publishers, 1998). Two examples are apropos. Subsection (b)(1) forbids self-dealing. *See New York State Teamsters Council Health & Hosp. Fund v. Estate of DePerno*, 816 F.Supp. 138 (N.D.N.Y 1993)(§ 406(b)(1) violation occurs whenever fiduciary deals with assets of plan in his or her own interest; financial loss to fund is not required), *aff'd in relevant part*, 18 F.3d 179 (2nd Cir. 1994). And § 406(b)(3) – commonly called the "anti-kickback" proviso – prohibits a fiduciary from receiving consideration "for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." Whether § 406(b)(3) is violated "does not depend on whether fund assets are harmed." Woodruff, *ERISA Law Answer Book*, Q 7:4, p. 7-7. These observations further *Mertens'* unequivocal endorsement of ERISA § 409 relief, generally, and disgorgement as a specific remedy, where § 406 is violated.[7]

Here, FMA unquestionably served as an ERISA fiduciary. And, **the Seventh Circuit's opinion assumes FMA committed or participated in fiduciary breaches, including ERISA § 406(a) and § 406(b)(1) and (3) violations.** *FMA*, 266 F.3d at 656 - 658. (App. A, *infra*, p. A-5.) The importance of the latter violations cannot be overstated.[8] In addition to removing the § 408 shelter, as discussed above, these violations highlight a serious flaw in the court's analysis. Section

[7] The ERISA § 408(c)(2), 29 U.S.C. § 1108(c)(2), exemption for "reasonable compensation" does not extend to § 406(b) violations. These are "per se" violations, *Gilliam v. Edwards*, 492 F. Supp. 1255 (D. N.J. 1980), *citing Cutaiar v. Marshall*, 590 F.2d 523, 529-530 (3rd Cir. 1979)(footnote omitted), and § 408(c) provides no shelter.

[8] ERISA § 406(b)(1) violations were alleged in the Fund's complaint. Section 406(b)(3), the "anti-kickback" provision, was not specifically cited in the complaint or the Fund's briefs. Nevertheless, FMA's role in § 406(b)(3) violations

406(b)(1) and 406(b)(3) violations are predicated, in part, on the use of plan assets. As discussed above, it is illogical and contradictory to conclude that plan assets were used to establish liability, but deny a remedy because profits cannot be linked to plan assets.

Mertens, then, clearly compels disgorgement of FMA's profits. The Supreme Court is urged to intervene if, for no other reason, to confirm *Mertens'* disgorgement command and to clarify what conduct triggers this command, *i.e.*, all § 406 violations or a select subset.

D. Trust Law as Interpreted by the Supreme Court Requires Disgorgement or Imposition of a Constructive Trust

1. Principles of Trust Law

Apart from the clear directive in *Mertens*, the common law of trusts demands that FMA disgorge its profits. In fashioning "appropriate equitable relief' under ERISA § 409, a reviewing court must look to general "principles of trust law." *See, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989). *See also, Varity Corp.*, 516 U.S. at 496; and *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 570-71 (1985). One trust law principle subjects malfeasant fiduciaries to disgorgement of all fees received. *See, for example, Carter*, 217 U.S. 286; *Magruder v. Drury and Maddox*, 325 U.S. 106 (1914); *Crites v. Prudential Insurance Co.*, 322 U.S. 408 (1944); and *Mosser v. Darrow*, 341 U.S. 267 (1951). In *Carter*, this Court warned:

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were "properly presented for consideration" below. *Harris Trust*, 530 U.S. at 245, n. 2, *quoting Yee v. Escondido*, 503 U.S. 519, 534 (1992).

Clearly, the Seventh Circuit understood the "tenor of the argument." *Ibid.* It used the term "kickback"and accepted that kickbacks were paid: "It turns out that East West was paying a kickback to one of the fund's trustees (since indicted and convicted), who in turn steered FMA to East West." 266 F.3d at 656. (App. A, *infra*, p.A-3.) Indeed, there were several evidentiary references to kickbacks. Roach's affidavit, discussed above in the "Statement of the Case", is the most prominent. It details the kickback scheme and FMA's participation. To suggest otherwise, that is, to suggest the Court of Appeals did not assume an ERISA § 406(b)(3) violation, misstates the obvious.

> It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency. The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity, or benefit in violation of his duty, ... without a full disclosure, it is a betrayal of his trust and a breach of his confidence, and he must account to his principal for all he has received.

Carter at 306. This admonition applies equally to public and private agents. *Id.* at 308. It extends to agency and trust law. *Id.* at 306.

Other authorities echo this theme. The *Restatement (Second) of Agency*, § 469 (1958), teaches that a wilfully disobedient or disloyal agent forfeits his compensation even if he properly performs some service. *See, also*, 1 Dan B. Dobbs, *Law of Remedies* § 4.1(1) at 552 (2d ed. 1993)(restitution prevents unjust enrichment); and *Restatement of Restitution* § 1, cmt. e (1937)(same). Accordingly, disgorgement is measured solely by "the defendant's gain and seeks to force disgorgement of that gain." *See Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 945 (8th Cir. 1999)(the "classic case of restitution" is "disgorging the profits from the ill-gotten wrongdoer").

2. ERISA's Incorporation of Trust Law

Examination of ERISA in conjunction with common law trust principles embraced by this Court leads to the inescapable conclusion that § 409(a) authorizes broad equitable relief, including disgorgement from disloyal, self-interested fiduciaries.

Mertens indicates the equitable relief clause of § 502(a)(3) retains the common law underpinnings for disgorgement. *See Mertens*, 508 U.S. at 260 and *Harris Trust*, 530 U.S. at 248. ERISA § 409 also authorizes "equitable relief" to be awarded

in similar fashion. *Cf. Mertens*, 508 U.S. at 260, where, following a comparison to § 502(a)(3) to § 502(a)(5), this Court wrote:

> [W]e certainly agree ... that language used in one portion of a statute ... should be deemed to have the same meaning as the same language used elsewhere in the statute ... Indeed, we are even more zealous advocates of that principle than petitioners, who stop short of applying it directly to the term "equitable relief."

In fact, in *Leigh v. Engle*, 727 F.2d 113, 139 (7th Cir. 1984), *cert. denied sub nom., Estate of Johnson v. Engle*, 489 U.S. 1078 (1989), the Seventh Circuit acknowledged disgorgement as a remedy available under § 409(a). ERISA's legislative history buttresses this conclusion: "The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts." S. Rep. No. 127, 93d Cong., 2d Sess. 3 (1974), *reprinted in* 1974 U.S.C.C.A.N., 4639, 4871. This legislative history inspired several courts to award a remedy "which is most advantageous to the participants and most conducive in effectuating the purposes of the trust." *Mazzola*, 716 F.2d at 1235, *citing Eaves*, 587 F.2d at 462. In some scenarios, a constructive trust may be the most advantageous form of "appropriate equitable relief." *See, Murdock*, 861 F.2d at 1411.

The Seventh Circuit limited these equitable remedies to profits generated "through the use of assets of the plan", *FMA*, 266 F.3. at 658, (App. A, *infra*, pp. A-5, 6), that is, by a fiduciary's "appropriating plan assets or investing them in a risky fashion in order to maximize his fee." *Ibid.* (App. A, *infra*, p. A-6.) Finding no evidence of appropriation or risky investment, the court withheld relief. *Ibid.* (App. A, *infra*, p. A-6.) As discussed above, the Pension Fund believes it did prove misappropriation. Regardless, trust law offered the Fund equitable relief without the conditions the Seventh Circuit grafted.

Carter, Magruder, Mosser and *Crites* underscore the impor-

tance of this certiorari petition. For nearly 100 years, the Supreme Court has steadfastly held fiduciaries to high, unwavering standards of conduct and denied them ill-gotten gains. The Seventh Circuit's decision stands in stark contrast.

E. Supreme Court Intervention Will Resolve Conflicts in Principle and Thwart Harm

The Seventh Circuit's decision violates the terms and spirit of ERISA, as amplified by trust law. It also threatens confusion as other courts struggle to reconcile the Seventh Circuit's circumscribed interpretation of ERISA's equitable remedies with the expansive interpretation preferred by other appellate courts.

Confusion awaits because the Seventh Circuit disregarded *Varity*, which recognized broad equitable remedies, consistent with the common law of trusts. 516 U.S. at 512, *citing*, S. Rep. No. 93-127, p. 35 (1973), 1 Leg. Hist. 621 and H.R. Rep. No. 93-533, at 17, 2 Leg. Hist. 2364. The Seventh Circuit favored a rule which profoundly limits the ability of ERISA plaintiffs to remedy fiduciary misconduct, such as participation in a kickback scheme.

A comparison to *GIW, supra*, adds to the confusion. There, the district court ordered disgorgement of management fees pursuant to ERISA § 409(a) even though the breaching fiduciary acted in good faith. *GIW*, 10 E.B.C. 2290 (Conclusions of Law, ¶ 26). There was no hint of fiduciary disloyalty. There was no trace of corruption or a sophisticated kickback scandal. The Eleventh Circuit affirmed the disgorgement order without comment. 895 F.2d at 734. Its actions literally speak louder than words. If the court considered disgorgement appropriate because the fiduciary failed to diversify the fund's portfolio and account for impending cash withdrawals, it is safe to say the Eleventh Circuit would order disgorgement when a disloyal fiduciary conspires in a kickback scheme.

A conflict in principle thus emerges. Under the Seventh Circuit's approach, this same fiduciary would be allowed to

keep its fee because it did not appropriate fund assets or invest in a risky scheme to maximize fees. Opinions from other sister circuit courts also conflict in principle with the Seventh Circuit's decision. Consider *Lowen*, 829 F.2d at 1209. There, a pension plan sued its investment manager and others for investing "in companies in which one or more defendants owned an interest and/or from which one or more defendants received fees or other consideration." 829 F.2d at 1212. The Second Circuit found the investments and consideration were prohibited transactions under ERISA §§ 406(b)(1) and (b)(3) and, pursuant to ERISA § 409(a), ordered disgorgement of fees "received in violation of [§] 406." *Id.* at 1221. Although predating *Mertens*, the Second Circuit's decision in *Lowen* adheres to the principle that disgorgement is mandatory for § 406 violations. Because the Seventh Circuit decision does not, *Lowen* may be added to the growing list of conflicting cases.

Lowen is notable for other reasons as well. By analogy, the decision also conflicts with the reasoning of the Seventh Circuit here. In *Lowen*, the court construed ERISA § 406(b)(3) which contains the phrase "in connection with a transaction involving the assets of the plan." 29 U.S.C. § 1106(b)(3). This language, the Second Circuit wrote,

> should not be construed in a way that creates a loophole that permits self-dealing and, in particular, "kickbacks" to fiduciaries. *See* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5089.

829 F.2d at 1209. The Fund submits that the Seventh Circuit created a kickback loophole by grafting the "use of [plan] assets" phrase onto the equitable or remedial relief clause of ERISA § 409(a).

Murdock, 861 F.2d 1406, represents a final conflicting case, at least in principle. There, the plaintiffs in part sought a constructive trust on a fiduciary's ill-gotten gains. The district court ruled that ERISA does not permit a constructive trust. The Ninth Circuit reversed. "The imposition of a construc-

tive trust" is appropriate "when it is the only means of denying a fiduciary ill-gotten profits that flow from the breach of his duty of loyalty to the entire ERISA plan." 861 F.2d at 1414.

In an interesting twist, the court determined a constructive trust was "important, appropriate and available" even though the participants and beneficiaries received their actuarially vested plan benefits following the plan's termination. *Id.* at 1413. The question then becomes, didn't the remedy amount to a windfall? A similar question was posed by the Seventh Circuit at oral argument in this case, when informed that the Fund's portfolio had appreciated in value under FMA's stewardship. Apparently, the possibility of awarding a "windfall" to the Fund troubled the court.

With all due respect, the court's attention should have remained on FMA's misconduct. As noted earlier, disgorgement prevents a defendant's unjust enrichment. 1 Dan B. Dobbs, *Law of Remedies, supra*, at 4.1(1); *Restatement of Restitution, supra*, at § 1. Disgorgement "force[s] a 'defendant to give up the amount by which he was unjustly enriched'... ." *S.E.C. v. Johnston*, 143 F.3d 260, 263 (6th Cir. 1998)(citations omitted).

The Seventh Circuit's concern with the Fund's unjust enrichment or windfall was ill-advised. As the Ninth Circuit explained,

> [t]he purpose of the rule [denying a disloyal trustee the profits of his breach] is not to make beneficiaries whole for any damages they may have suffered. In fact, whether beneficiaries have been financially damaged by the breach is immaterial.

861 F.2d at 1411-12, *quoting* G. Bogert and G. Bogert, *The Law of Trusts and Trustees*, § 543, at 217(2d ed. 1978). The court quoted this same treatise again to emphasize deterrence:

> The purpose behind [the disgorgement] rule is to deter the fiduciary from engaging in disloyal conduct by denying him the profits of his breach. ... [T]he objective is to make "disobedience of the

> trustee... so prejudicial to him that he and all other trustees will be induced to avoid disloyal transactions in the future.

861 F.2d at 1411, *quoting Law of Trusts and Trustees, supra*, at § 543, p. 218.

In sum, the Ninth Circuit accounted for the unique facts of *Murdock* and tailored corresponding equitable relief to prevent unjust enrichment and promote deterrence. ERISA § 409(a) allows for this kind of flexibility. The Fund believes the Seventh Circuit's decision deprives this critical enforcement provision of the flexibility Congress intended.

GIW, Lowen, and *Murdock* further ERISA's remedial aims and adhere to the common law of trusts. By the Fund's account, the Seventh Circuit's contrasting, circumscribed position lacks legislative authority and judicial acceptance. Neither the text nor the legislative history of ERISA § 409 and 502(a)(3) condition disgorgement on a finding of appropriated assets or risky investment schemes. Instead of the broad relief Congress intended (and courts had previously awarded), the Seventh Circuit severely restricts a litigant's — be it a pension fund, participant, or the Department of Labor — ability to command strict fiduciary accountability.

The facts of this case graphically illustrate the Seventh Circuit's error. FMA received $4,889,349.84 in fees and $3,562,448 in profit. It was handsomely and unconscionably rewarded for its role in the felonious kickback scheme. The Seventh Circuit, in effect, rewarded the breaching fiduciary for its forbidden conduct. Without Supreme Court guidance, other courts may follow suit to rip a hole in the "safety net" metaphor referenced in *Varity, 516 U.S. at 512,* and destroy the legislative logic of the catchall provision in § 409(a) discussed in *Murdock,* 861 F.2d at 1416.

Disloyal fiduciaries must be held accountable for their actions. The Fund paid for FMA's loyalty and got none. FMA betrayed the trust it was bound to honor. It should be made to forfeit its profits. After all, its conduct was inexcusable. There are no mitigating circumstances. Good faith does not

surface. Instead, to swell its bottom-line and stuff its coffers, FMA chose to collaborate with a criminal enterprise. This is as egregious a fiduciary breach as any. What of "lesser offenses"? If this type of conduct goes undeterred, the Seventh Circuit's decision makes pension funds vulnerable to faithless fiduciaries, racketeers and money launderers.

In sum, the Seventh Circuit's decision to limit "disgorgement" to instances of appropriated fund assets or risky investments to maximize fees runs afoul of ERISA's text, policy and purpose. The Seventh Circuit paid no heed to trust law and a wealth of decisions, including decisions of this Court. If left to stand, the Seventh Circuit's ruling promises to do great mischief to the "comprehensive" and "reticulated" scheme embodied in ERISA. *See Nachman*, 446 U.S. at *361*.

III. The Seventh Circuit's Rule Has Other Wide-Ranging Implications

The impact of the Seventh Circuit's decision is far-reaching. As previously noted, ERISA § 502 also confers enforcement rights to the Secretary of Labor — and to plan participants. In this vein, the Seventh Circuit's opinion could hamper the Department of Labor by seemingly restricting remedies once enjoyed. No longer armed with equitable remedies (except in limited situations), its mission and policies may be undermined. Present strategies will need to be revisited.

And deviant fiduciaries, no longer facing the threat of disgorgement, may rethink their commitment to trust obligations — as long as their client fund suffers no economic loss and they do not "appropriate" plan assets or "invest... in a risky scheme to increase... fees." But the very process of rethinking fiduciary commitment causes incalculable harm to pension funds. Effort that should be expended to further fund interests is drained and diverted, all the more when loyalty is, in fact, ultimately divided. Transactions and administrative decisions under consideration will be viewed by the compromised, disloyal fiduciary through a different kind of prism: in this scenario, proposals must be assessed for their

danger of exposing the underlying disloyalty, not only for their impact on a fund's asset base. In other words, a disloyal fiduciary casts two gazes: one looks forward at a fund's future; the other looks back in the rear-view mirror to make sure his tracks are covered, to make sure his selfish interest is not in jeopardy and will not be unveiled.

For these reasons, divided loyalty causes incalculable intangible harm. Yet the Seventh Circuit's focus on demonstrable profits linked to the misuse of assets — via appropriation or via risky investment schemes designed to maximize fees — burdens pension funds with a difficult and expensive task. A fund must immerse itself in the complexities of Wall Street's high tech trading practices and procedures to measure its harm and ferret out the causal relationship between fund injury and the discrete profits attributable to the treachery of disloyal fiduciaries.

In short, the Seventh Circuit imposes a heavy burden on funds. The Supreme Court previously disapproved of such an imposition on trust administration. In *Mosser, supra*, a bankruptcy trustee, though not personally profiting, permitted key employees to profit from trading in securities of the debtor's subsidiaries. Justice Jackson wrote:

> [I]t is difficult to say that there was no injury to the estate of the trust through these transactions. *But equity has sought to limit difficult and delicate fact-finding tasks concerning its own trustee by precluding such transactions for the reason that their effect is often difficult to trace,* and the prohibition is not merely against injuring the estate – it is against profiting out of the position of trust.

341 U.S. at 273 (italics supplied).

The Seventh Circuit's decision does not square with Justice Jackson's pronouncement in *Mosser*. It also undermines the legislative intent and the practical value of ERISA § 405(d)(1), 29 U.S.A. § 1105(d)(1). Despite Congress' intent in this provision to free trustees of the burden of managing assets, time and energy devoted to other pension fund

causes will now have to be allocated to managing assets. This is a real practical concern.

The Seventh Circuit's focus portends other practical harm. Think of the damage to the trust and confidence participants and beneficiaries place in their ERISA plan fiduciaries. With their profits safely insulated from recovery by civil litigants absent proof of the Seventh Circuit's requirements, fiduciaries may be inclined to design clever, covert schemes to "feather their own nests". One can easily imagine a cloud of suspicion enveloping fund administration.

CONCLUSION

For the reasons stated, Petitioners pray that this Honorable Court grant the Petition and reverse the judgment of the court below in order to restore order, uniformity, and reason to the law governing employee benefit plans.

Respectfully Submitted,

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No._____

IN THE

Supreme Court of the United States

FRANK J. WSOL, SR., HUGH M. CORCORAN, ROBERT N. FALCO, NEIL J. LONDON, CHARLES SCHMALZ, PHILLIP STANOCH, AS TRUSTEES OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION LOCAL NO. 710 PENSION FUND, AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION LOCAL NO. 710 PENSION FUND

Petitioners,

v.

FIDUCIARY MANAGEMENT ASSOCIATES, INC. AND EAST WEST INSTITUTIONAL SERVICES, INC.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Appendix A

Frank J. Wsol, Sr., et al., Plaintiffs-Appellants, v. Fiduciary Management Associates, Inc. and East West Institutional Services, Inc., Defendants-Appellees.

Nos. 00-2703, 01-1685

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

266 F.3d 654

March 27, 2001, Argued (No. 00-2703); August 28, 2001, Submitted (No. 01-1685)

September 12, 2001, Decided

JUDGES:

Before Posner, Manion, and Williams, Circuit Judges.

OPINION BY:

Posner

Posner, *Circuit Judge*. The plaintiffs, trustees of a Teamsters pension fund, brought this ERISA suit for breach of fiduciary duty by an investment advisor that the fund had retained, Fiduciary Management Associates, and an "introducing broker" that FMA had in turn retained, East West Institutional Services. At trial (a bench trial), at the close of the plaintiffs' case, the district judge entered judgment for the defendants on the basis of findings of fact that she made on the authority of Fed. R. Civ. P. 52(c). Rule 52(c), added to the civil rules in 1991, streamlines bench trials by authorizing the judge, having heard all the evidence the plaintiff has to offer, to make findings of fact adverse to the plaintiff, including determinations of credibility, without waiting for the defense to put on its case, since the evidence presented by the defendant would be unlikely to help the plaintiff.

The plaintiffs are also appealing from the judge's denial of their motion under Fed. R. Civ. P. 60(b)(2) to vacate the

judgment on the ground of newly discovered evidence. We have consolidated the two appeals for decision. East West has settled with the plaintiffs, though the settlement is, as we understand it, contingent on the reversal of the judgment. East West has not filed a brief; we do not understand the plaintiffs to be seeking relief against it any longer; and so we'll not discuss its liability.

The appeals raise a number of questions, but one is dispositive and so we ignore the rest. The plaintiffs cannot prevail unless the breach of fiduciary duty either imposed a loss on the plan or generated a profit for FMA "through use of assets of the plan" by FMA. 29 *U.S.C.* § *1109*(a); *Leigh v. Engle, 727 F.2d 113, 121-22 (7th Cir. 1984); Etter v. J. Pease Construction Co., 963 F.2d 1005, 1009-10 (7th Cir. 1992); Felber v. Estate of Regan, 117 F.3d 1084, 1087 (8th Cir. 1997);* James F. Jorden et al., *Handbook on ERISA Litigation* 3-104 to 3-106 (2d ed., Supp. 2000). If the former, they are entitled to damages, and if the latter, to the recovery ("disgorgement," as the cases call it) of FMA's profit on a theory of unjust enrichment or, equivalently, constructive trust, a standard remedy against malfeasant fiduciaries. The plaintiffs have not established a basis for either remedy, however, and so they lose.

The keys to understanding the case are three terms, "introducing broker," "directed brokerage," and "best execution." An introducing broker (we'll get to the other terms later) is a broker who doesn't actually execute the customer's trades but instead acts as an intermediary between the customer and the executing broker, collecting a fee from the customer that covers the fee charged by that broker. *Gilman v. BHC Securities, Inc., 104 F.3d 1418, 1423 (2d Cir. 1997).* East West was the introducing broker that FMA used on the trades it made for the plaintiffs' pension fund. FMA paid East West 6 cents per trade and East West turned around and paid the executing broker 2 cents. This spread is common, but the introducing broker does not pocket the entire difference; instead he passes part of it back to the customer (in this case FMA) in the form either of a rebate or of "soft money" consisting of securities analysts' reports and other investment infor-

mation. The fund reimbursed FMA for the 6 cents that FMA paid East West.

It turns out that East West was paying a kickback to one of the fund's trustees (since indicted and convicted), who in turn steered FMA to East West. The plaintiffs argue in their main appeal that had FMA investigated East West, as it should in the exercise of due care have done, not only would it have discovered the unsavory connection between the trustee and East West; it would also have discovered that East West's principals were shady and the firm itself little more than a mailbox. Instead FMA treated the trustee later unmasked as a crook to expensive golf outings and hired East West as its introducing broker in order to curry favor with him.

The district judge found that FMA had exercised all due care. But if she was wrong, as the plaintiffs argue with particular vehemence in their Rule 60(b) motion, which presents newly discovered evidence of skullduggery, and not merely of negligence, by FMA, it makes no difference to the outcome of the case. For surprising as this may seem, the shady operation that was East West appears to have given the fund all the benefits it would have received had FMA either retained a reputable introducing broker or dealt directly with the executing brokers. In either case, FMA, which is to say the fund, would have paid 6 cents a share per trade; that is the standard fee and there is no proof that FMA could have obtained comparable trading services for less.

The fund could, it is true, have reduced the execution cost by "directed brokerage," that is, by directing FMA to execute trades through a particular broker. See SEC Release IA-1862, *65 Fed. Reg. 20524, 20538* (Apr. 17, 2000); Donald J. Myers, "Directed Brokerage and 'Soft Dollars' Under ERISA: New Concerns for Plan Fiduciaries," 42 *Business Lawyer* 553, 568-69 (1987). By thus bypassing the introducing broker, FMA and so the fund would have paid only 2 cents a share per trade. But with directed brokerage, the broker does not guarantee "best execution," which means getting the best terms for the customer that are available in the market at the

time, e.g., *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, *135 F.3d 266, 270 (3d Cir. 1998)* (en banc); *Tannenbaum v. Zeller, 552 F.2d 402, 411 (2d. Cir. 1977)*; SEC Release 34-37619A, *61 Fed. Reg. 48290, 48322-23* (Sept. 12, 1996), a duty the executing broker owes by virtue of his fiduciary relationship to his customer. See, e.g., *United States v. Dial, 757 F.2d 163, 168 (7th Cir. 1985); Magnum Corp. v. Lehman Brothers Kuhn Loeb, Inc., 794 F.2d 198, 200 (5th Cir. 1986).* For with directed brokerage the responsibility for making the best deal is with the director, that is, the fund manager. SEC Release 34-23170, *51 Fed. Reg. 16004, 16011* (Apr. 30, 1986). Anyway the fund's trustees had not authorized directed brokerage; so it's a moot point whether FMA would have conferred a net benefit on the fund if, at its customer's direction, it had bypassed East West and dealt directly with the executing brokers on a directed-brokerage basis, paying only 2 cents per trade rather than 6 cents but forgoing best execution.

Was "best execution" worth 4 cents per share? Because best execution has multiple dimensions that tend to be in conflict (such as speed of execution and transaction price), Jonathan R. Macey & Maureen O'Hara, "The Law and Economics of Best Execution," *6 J. Fin. Intermediation* 188, 219-20 (1997), its net advantage seems unlikely to equal fully two-thirds of the total cost of executing the transaction (4¢ ÷ 6¢), although remember that part of the 4 cents is rebated either in cash or in investment advice. But these considerations are not material in this case. What is material is that the district judge found as a fact that what the fund got for its 6 cents per share was as good as what it could have bought in a market free of kickbacks and undue influence and that her finding is not clearly erroneous on the record compiled at trial, even as supplemented by the additional evidence that the plaintiffs presented in their Rule 60(b) motion. Despite the disreputable character of East West and the scandalous provenance of its relationship with FMA, the fund received best execution at the same cost that it would have incurred had FMA hired a choir of heavenly angels as introducing brokers or had dealt directly with the executing brokers; and while 4 cents per

share seems a stiff price to pay for best execution, it is the standard price and there is no proof that FMA could have gotten a lower price by using an introducing broker other than East West. Although it is conceivable that FMA received less valuable investment advice from East West than it would have from a reputable introducing broker and as a result made poorer investments for the fund, the district judge found the contrary and her finding is not clearly erroneous. So far as appears, FMA's investment performance was as good as it would have been had East West never entered the picture.

Nor is it contended that FMA's management fee was excessive; and the 6 cents a share per trade that it charged back to the fund was, as we have noted already, the standard charge. There is no evidence that FMA obtained a profit that it would not have obtained but for the alleged breach of its fiduciary obligation. If the newly discovered evidence that the plaintiffs unavailingly pressed on the district judge in their Rule 60(b) motion is credited, not only would FMA not have gotten the fund's business had it not retained East West as introducing broker, but FMA knew about the crooked relationship between East West and one of the fund's trustees. But that is just to say that if the evidence is believed, FMA committed a very serious breach of its fiduciary duty. Even so, the fund was not harmed and FMA obtained no greater profit than it would have obtained had it not retained East West.

Besides FMA's management fee, the plaintiffs are seeking the profit that East West made from acting as introducing broker. But East West did not annex a profit opportunity that belonged to the fund. Had FMA used a reputable introducing broker, it might have received more valuable investment information and might as a result have given the plaintiffs better advice; but, as we have said, the plaintiffs failed to prove this.

The remedy of disgorgement is limited to cases in which the breach of the fiduciary obligation enables the fiduciary to make a profit "through [the fiduciary's] use of assets of the

plan." The kind of misconduct contemplated is the fiduciary's appropriating plan assets or investing them in a risky fashion in order to maximize his fee. If no misuse of the funds occur, if no losses are incurred or profits obtained that differ from what they would have been had there been no breach of fiduciary duty, there is no remedy. See *Leigh v. Engle, supra, 727 F.2d at 137-39; Etter v. J. Pease Construction Co., supra, 963 F.2d at 1009-10; Felber v. Estate of Regan, supra, 117 F.3d at 1087.*

Affirmed.

Appendix B

FRANK J. WSOL, SR., et al., Plaintiffs, vs. FIDUCIARY MANAGEMENT ASSOCIATES, INC., et al., Defendants.

No. 99 C 1719

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2000 U.S. Dist. LEXIS 955

January 27, 2000, Decided

January 28, 2000, Date Docketed

JUDGE:

Suzanne B. Conlon, United States District Judge.

OPINION:

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE SUZANNE B. CONLON, BENCH TRIAL

THE COURT: Please be seated.

This is 99 C 1719, Wsol versus FMA. All counsel present. I guess all counsel are present, and then some.

This is going to take me a while. As you might recall, the arguments on the motion for directed verdict consumed more than three hours. I hope not to take three hours, but to cover each of the counts and the arguments of evidence adequately, it is going to take me a while to go through this.

First, I want to identify the record that was considered in ruling on the defense motion: all trial testimony and exhibits admitted into evidence, the arguments of counsel, and the cases cited and provided to the Court by counsel. I might add that there does not seem to be much dispute as to the legal standards that apply to the case. There are certainly dramatic differences in the analysis of the evidence and the inferences

to be drawn or not to be drawn from the evidence. But concerning the elements of each count, there appears to be no dispute. Nor is there a dispute on the burden of proof, except with regard to damages.

I also considered the deposition summaries of Steve Brown, David Muncie and George Kolar, even though they did not conform with the standing order. But there wasn't any prejudice to the defense in considering these three deposition summaries. The defendant's objections to language were noted by a line drawn through portions of the summary and the counter-designations were in bold print. So from that, I could get a full picture of what each side presented from the depositions.

In connection with the Brown deposition, Plaintiffs' Exhibit 24 is admitted without objection. The objections to Plaintiffs' Exhibits 3 and 140 are sustained. And the plaintiffs are granted leave to withdraw Plaintiffs' Exhibits 4, 7, 25, 46, 135 and 188.

(Plaintiffs' Exhibit No. 24 was received in evidence.)

THE COURT: With respect the Muncie deposition summary, Plaintiffs' Exhibit 122 is admitted without objection. The objections to Plaintiffs' Exhibits 85 and 89 are sustained. And plaintiffs are granted leave to withdrawn Plaintiffs' Exhibit 87.

(Plaintiffs' Exhibit No. 122 was received in evidence.)

THE COURT: With respect to the Kolar deposition summary, Plaintiffs' Exhibits 54, 56, 164 are admitted without objection. The objections to Plaintiffs' Exhibits 171, 199, 200 and 201 are sustained. And plaintiffs are granted leave to withdraw Plaintiffs' Exhibit 53.

(Plaintiffs' Exhibit Nos. 54, 56, 164 and 164 were received in evidence.)

THE COURT: The summary of Christopher Roach's deposition was considered only insofar as the statements may be admissions of a party opponent; that is, admissions by East West, and where his use of the Fifth Amendment may be a

basis for a negative inference against the defendant East West. The Roach deposition summary was not considered in any respect against the defendant FMA.

Oh, I left the pretrial order in chambers. I need the stipulated facts, what stipulated facts there are. Don't stand up. I will be right back.

(Brief recess.)

THE COURT: Please remain seated.

I have read the deposition summaries of Perry Keck, Craig Janutol, Donna Wilkinson, Rai Ramnarace, Laura DeBruyne, Stanley Abel and James Ramirez. But I cannot give these incomplete summaries any significant weight because the summaries only contain the plaintiffs' designations. There are no counter-designations reflected nor are there defendant's objections noted. And so I cannot properly consider whether there are any admissibility problems with this testimony or whether plaintiffs' unilateral summary is a fair and complete contextual representation of the testimony. I received these summaries on Friday at 11:24 a.m., just before argument on this motion.

Now, the standard applicable to the motion is clear and uncontested. Rule 52(c) of the Federal Rules of Civil Procedure permits a judge in a bench trial to enter a judgment at any time that the court deems the evidence warrants dispositive findings. And at this juncture the court may weigh the evidence, resolve conflicts in the testimony and credibility issues and decide where the preponderance of the evidence lies.

I will begin with the uncontested facts that are stated in the pretrial order. They are very sparse, but I will adopt them for purposes of this ruling:

The individual plaintiffs are the current trustees of the International Brotherhood of Teamsters, Union Local 710 Pension Fund. Those trustees and the fund bring this action on behalf of the fund against Fiduciary Management Associates, Incorporated, an investment manager retained by the fund, and East West Institutional Services, Incorporated, a bro-

kerage firm involved for a period of time in certain trades of fund assets.

Plaintiffs allege violations by FMA — and I will refer to Fiduciary Management as FMA as the parties have throughout the trial — of the Employee Retirement Income Security Act of 1974, or ERISA, because of FMA's participation in violations of Title 29 U.S. Code, Section 1106, and breach of contract claims against FMA.

FMA denies that it violated ERISA, denies that it breached its contract with the fund, and denies that the fund was in any way damaged. FMA further alleges the affirmative defenses that plaintiffs' claims are barred by, among others, the doctrines of waiver and estoppel, are time-barred, and are barred by Rule 28(e) of the Securities and Exchange Act of 1934.

Jurisdiction over Counts 1 through 7 and 11 is conferred by Title 29 U.S. Code, Section 1132(f). Jurisdiction over Counts 8 through 10 is conferred by Title 28 U.S. Code, Section 1367. Jurisdiction is not disputed. Venue is proper in this district pursuant to Title 29, U.S. Code, Section 1132(e)(2) because the fund is administered in this district.

Plaintiffs Frank J. Wsol, Jr., Hugh M. Corcoran, Robert N. Falco, Neil J. London, and Charles Schmaltz and Phillip Stanoch, who are referred to as the current trustees of the fund and are fiduciaries of the fund within the meaning of ERISA. All of the current trustees are residents of this judicial district.

The fund is an employee pension benefit plan within the meaning of ERISA. At all relevant times, the fund was administered in this judicial district by the fund's then existing trustees.

FMA is a corporation headquartered in Chicago, Illinois. FMA is an investment advisor retained by the fund to invest and manage fund assets pursuant to a written contract that was amended from time to time.

When the fund retained FMA in 1994, its trustees were Robert Baker, William Close, Hugh Corcoran, George Dob-

son, William Joyce and Frank Wsol. FMA ceased having any investment authority over the portfolio of fund assets at issue in January 1999.

Defendant East West is a Connecticut corporation that was headquartered in Michigan and is now located in Sarasota, Florida. This action was commenced on March 15, 1999.

In the last few days, I have re-read the trial transcripts and reviewed the exhibits. And from that review, I concluded that there are a number of other uncontroverted material facts, although there isn't a stipulation, there certainly wasn't any serious dispute about other relevant facts:

On June 18, 1994, the fund and FMA entered an asset management agreement. Frank Wsol and Robert Baker signed on behalf of the fund. Robert Carr, the chief executive officer of FMA, signed on behalf of FMA. The defendants, FMA and East West, are both fiduciaries within the meaning of ERISA. FMA's management fees for the fund's high cap equity portfolio were reasonable. Again, the testimony of all the trustees and the plaintiffs' expert on the subject, as well as the fund's administrator, agree that FMA's management funds were reasonable.

The brokers' commissions of six cents a share on stock transactions with bundled services on behalf of institutional investors like the fund is standard in the industry. And bundled services can include such services as execution, clearing and research.

FMA achieved best execution standards required of money managers in its handling of fund assets. There was no dispute by plaintiffs' witnesses as to that.

FMA's handling of Local 710's pension fund assets surpassed the applicable benchmark for the entire period FMA managed the fund's large cap portfolio. Indeed, during FMA's four and a half year watch, the value of the portfolio increased from 105 million dollars to 257 million dollars.

Only the full board of trustees has the authority to bind the fund by majority vote.

The board of trustees had an investment committee. During the relevant period, committee members were William Close, Robert Baker and Hugh Corcoran. Trustee Baker is now deceased and Trustee Close was terminated as a trustee in approximately October 1998. Of this original investment committee, only Trustee Corcoran remains. Trustee Close apparently disappeared sometime after his last board meeting when he was terminated in October 1998.

Trustee Close was FMA's initial contact with the fund in late 1993. FMA made two presentations to the full board. The first presentation was in February 1994, and the second presentation was some time later in spring 1994, although the date is not clear from the record.

Trustee Close introduced FMA's CEO, Mr. Carr, to the principals of East West, Christopher Roach and Richard Tringale. FMA had no prior dealings with East West, nor knowledge of East West.

In August 1997, the board and FMA first learned from media publications that the principals of East West, Christopher Roach and Richard Tringale, had previously been disciplined for mishandling securities transactions. FMA immediately terminated its business relationship with East West and the board retained counsel to conduct an investigation of East West's relationship with the fund.

Just from my several days of reviewing the record, those are the facts that I view as uncontroverted in the case at this juncture.

I also prepared a laundry list of disputed material facts. I know there are alot of facts that are disputed. Not all of them do I view as material. But I will go through the ones that I most readily identified in the record and considered in terms of the defendant's motion. And I pose these as questions:

Was FMA's use of East West as an introducing or corresponding broker a directed brokerage requiring board of trustees' authorization and specific disclosure requirements?

Was FMA disloyal to the fund participants and imprudent

in its dealings with Trustee Close, in particular in following Trustee Close's request that East West be used as the fund's introducing broker?

Did FMA breach its fiduciary duties to the fund participants by not adequately investigating East West and its principals?

Did FMA use East West in order to obtain Local 710's account?

Were East West's portions of the clearing brokers' commissions, in fact, a referral fee?

Did FMA's use of East West constitute self-dealing, a conflict of interest, or an improper transfer of fund assets?

Did FMA misuse the fund's assets?

Did FMA conceal information about its dealings with East West from the board?

Were research materials that East West forwarded to FMA duplicative and tardy or were they useful resource materials?

Were East West commissions excessive; and if so, did FMA have a fiduciary obligation to negotiate for lower commissions?

Did the funds suffer any loss as a result of FMA's conduct?

Those are the disputed material facts I was able to identify based on the trial record. As I said, there are other factual disputes. But, unless I add something in my analysis, I didn't view other factual disputes as material for purposes of this motion.

I start with my findings and conclusions as to Counts 8, 9 and 10 because they are the kind of issues that could have been disposed of on a motion to dismiss and do not involve a lengthy analysis of the record.

Counts 8, 9 and 10 are state law claims for breach of contract. All the claims asserted in these counts are based on alleged breach of essentially the same fiduciary obligations and prohibitions and are based on precisely the same evi-

dence offered on Counts 1 through 7 pertaining to ERISA claims. Moreover, the plaintiffs ask for the same relief in all counts. Counts 8, 9 and 10 are clearly preempted by ERISA, Title 29, U.S. Code, Section 1144(a). Accordingly, Counts 8, 9 and 10 are dismissed. This means that the collateral claims belatedly raised just before trial as to Main Street Advisors and Murray Johnstone International are irrelevant. When I inquired where in the complaint those claims fall, plaintiffs responded they fall within the breach of contract claims. So those matters concerning Main Street Advisors and Murray Johnstone International are irrelevant.

Then I return to Count 1, which requires a bit more analysis. Count 1 is a claim for breach of FMA's fiduciary duties under Title 29, U.S. Code, Section 1104(a)(1)(a).

If you bear with me. I am using several different documents this afternoon.

(Brief pause.)

THE COURT: The provision under which Count 1 is brought states that,

> ... a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan...

And there's no dispute as to the applicable standard as to Count 1. To establish this claim, the plaintiffs must prove three elements, a breach of FMA's duty, a loss and a casual connection between the two.

Within the allegations of the complaint, and there are some specific allegations made in Count 1, the claim basically is that FMA breached its fiduciary duties because it did not directly or indirectly obtain any services or anything of value from East West in exchange for the payment of fund assets to East West. And plaintiffs further allege that they are damaged by the payment of commissions against the fund's equity transactions. So, in sum, the plaintiffs must establish

by a preponderance of the evidence that FMA caused the payment of commissions to East West, but that FMA, on behalf of the fund's participants, did not obtain any services or anything of value from East West.

The proof fails to establish these allegations. In its role as an introducing broker, East West facilitated equity stock transactions with various clearing brokers. According to the record, that was what introducing brokers do. And the plaintiffs did not establish that East West failed to perform these responsibilities. Indeed, the record established, without any dispute, that East West obtained best execution on these transactions. East West had access to reputable brokerage houses that it used to conduct the fund's transactions, such as Chicago Corp., Dean Witter and Paine Webber. And evidence established that these brokerage houses, the clearing brokers, did competently execute the transactions and protect the participants' best interests.

The evidence also established that East West forwarded large quantities of research, enough to fill five boxes for only part of the time involved, to FMA. This research had been generated by the research departments of the major brokerage houses that executed the trades. According to Mr. Carr, the research department found these materials useful, and some of the materials were from sources not otherwise available to FMA. On the other hand, plaintiffs' expert, Steven Berkowitz, opined that the research was duplicative and untimely street research. I find that Mr. Berkowitz, although a well-qualified expert, based his opinion on a superficial sampling of the materials in the five boxes. These were not all the materials received by FMA, but rather, those that were still in existence at the time of the subpoena in May of 1999. And his analysis of a "sampling" from the five boxes was very superficial. He just stated several conclusions. And I do not find his testimony had much in the way of probative value.

I am giving more weight to Mr. Carr's testimony as to this point because his testimony is supported by strong circumstantial evidence. It is obvious to me that FMA's investment

decisions on behalf of the fund participants were sound, well informed and timely. This inference can be reasonably drawn from the undisputed fact that FMA's investment strategy consistently produced strong profits that exceeded the fund's goals or benchmark.

Count 1 also alleges that the fund was damaged by the amount of commissions FMA paid for these stock transactions. The evidence clearly establishes just the contrary. Six cents a share is the industry standard commission for bundled services on behalf of institutional investors. FMA's use of East West as an introducing broker did not increase the transactional cost to the fund in any manner. In fact, it was the same rate FMA has used with all its institutional clients, although I believe there was some testimony that five cents was occasionally used. But six cents is the usual fee charged to institutional clients, with or without the use of an introducing broker.

East West's portion of the six-cent commission was negotiated directly between the clearing brokers and East West. According to the evidence that was presented here, only one clearing broker actually informed FMA of its apportion of commissions with East West. I find that Mr. Berkowitz's opinion that FMA could have bargained for a lower rate with brokerage houses was not persuasive and I have not given that particular conclusion much weight. I found Mr. Berkowitz very knowledgeable. However, his demeanor and his presentation appeared to me to be as an advocate for the plaintiffs. His objectivity on certain points is questionable, particularly when one considers the basis for his conclusions.

In any case, the overwhelming weight of the evidence presented in the plaintiffs' own case shows that the commissions paid on behalf of the fund participants were the very same rate the fund itself has paid and is now paying to other money managers. Again, this demonstrates the unreasonableness of Mr. Berkowitz's opinion.

The evidence simply does not support the plaintiffs' allegations that the fund was damaged or suffered a loss because

of commissions FMA paid on its behalf or caused to be paid. Therefore, the plaintiffs have not established by a preponderance of the credible evidence that FMA breached its fiduciary duties or that the plaintiffs suffered a resulting loss as alleged in Count 1.

Now, Count 2 is another claim of fiduciary breach lodged against FMA, this time under Title 29 U.S. Code, Section 1104(a)(1)(b). And Count 2 alleges eight different specific breaches of fiduciary duty — well, I shouldn't say that. They are not factually specific, but they are categorized in eight separate ways.

Now, the relevant statute on Count 2, provides that,

> ... a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

And, again, the elements are not disputed. The plaintiffs must prove by a preponderance of the evidence there was a breach of duty, loss, and a casual relationship between the breach of duty and the loss.

Now, I am going to go through all eight of the categories that are alleged as violations of fiduciary duty in Count 2. This will take a bit of time, so please bear with me.

Paragraph 27(a) of the complaint alleges that FMA failed to investigate East West prior to doing business with East West on behalf of the fund participants. The background and relevant circumstances as to this claim consists of the following:

Mr. Carr was introduced to the principals of East West by the person he thought was the fund's investment committee chair, Trustee Close. In fact, it was Trustee Close who was the first person from the fund that Mr. Carr had any contact with, and Mr. Carr had continuing contact with Trustee

Close before and after the asset management agreement was signed. Mr. Carr was introduced to the principals of East West by Mr. Close as a member of the fund's investment committee. And Trustee Close told Mr. Carr that he and Trustee Baker, another member of the fund's investment committee, knew East West well because East West did business with the Teamsters in Detroit. Trustee Close then excused himself at this meeting and Mr. Carr met directly with Mr. Roach and Mr. Tringale. Mr. Roach solicited FMA's business. During this presentation, no one from the fund was present. Mr. Roach represented that East West could provide superior research and that, although they were not brokers. They had contacts with reputable brokerage firms. There is a dispute — or just general vagueness in the record — as to when this introduction was made and when Mr. Carr was first approached to use East West. The evidence suggests that this introduction had to be before May 27, 1994, because of an entry in Mr. Carr's diary. I found Mr. Carr's memory was hazy and unreliable in alot of respects concerning this early history of the case. But insofar as I am able to find any corroboration in the exhibits, it appears that this introduction had to be before May 27th. At that point FMA had already made two presentations to the full board. And it is also apparent from the entries in Mr. Carr's diary, that he had lunch with Mr. O'Malley, who is administrator of the fund, and Trustee Close and Trustee Corcoran, who was also a member of the investment committee, in approximately April 1994. Now, I take that back. I am not absolutely certain if that is in the diary. That might be based on the testimony. I think that was the testimony of Mr. Carr. But those dates are very fuzzy. The best I can do, in terms of the vagueness of the record, is infer that this introduction occurred about the same time or after the full board of trustees independently decided to retain FMA, but before the asset management agreement was formalized between the parties in June 1994. I do not find any dispute or uncertainty about the exact date of the introduction to be material. At the time of the introduction, Mr. Carr did not agree to retain East West's services, but rather, told Mr. Roach to send him a packet of information and Mr. Carr

would have FMA's research department evaluate East West's services. But there is no evidence that would support a finding that FMA's hiring of East West or its retention of East West was a condition of the board's agreement with FMA to manage its large cap portfolio. In fact, the evidence establishes just the opposite. The trustees made their own independent decision to retain FMA.

The record also shows that, according to Mr. Carr's testimony, FMA's research department had a favorable reaction to the materials East West submitted and to the list of brokers that East West supplied, because they were reputable and reliable firms like Dean Witter, Paine Webber and Chicago Corporation. Mr. Carr concluded that the clearing brokers East West proposed to use would properly handle the fund's accounts and would provide best execution services.

Trustee Close was Mr. Carr's main contact with the fund. And because of Trustee Close's role in the fund's investment committee, Mr. Carr's reliance upon Mr. Close's recommendation of East West was reasonable. This is particularly true because of Trustee Close's representation that East West was performing services for the Teamsters in the Detroit area where East West was based at the time.

It is undisputed that FMA failed to check with the National Association of Securities Dealers for any adverse information regarding East West or its principals. However, according to the deposition testimony of Mr. Carr offered by the plaintiffs at trial, Mr. Roach told Mr. Carr that East West, Mr. Roach and Mr. Tringale were not brokers themselves. Therefore, FMA's failure to contact the NASD was not a breach of FMA's duty of due care to the fund's beneficiaries under the circumstances. This conclusion is also supported by the fact that Chicago Corporation independently investigated East West and conducted an on-site inspection of East West's facilities, limited though they were, in Michigan. And Chicago Corporation also did not contact the NASD or learn of Roach or Tringale's earlier disciplinary problems. So I find that the evidence does not establish a fiduciary breach for

failure to investigate.

Section (b) of paragraph 27 complains that FMA violated its fiduciary obligations by entering into an oral rather than a written agreement with East West. No evidence or even arguments were made to show why the absence of a written contract constitutes a fiduciary breach. It has not been shown that it was even practicable to have written contracts with an introducing broker who is dealing with various clearing houses under these circumstances. In any case, there is no evidence that the fund's assets were placed at risk by the absence of a written contract between East West and FMA.

Paragraph 27 (c) complains that FMA breached its fiduciary obligations by not obtaining any services or anything of value from East West in exchange for the payment of fund assets to East West. The record established that East West provided best execution, access to reputable and reliable clearing services, and research. This claim fails for lack of evidentiary support.

Paragraph 27 (d) complains that FMA violated its fiduciary duties by not informing the fund trustees that a substantial portion of the brokerage fees on the fund's investments were paid to East West. It is clear from the evidence, however, that FMA was not a party to negotiations between clearing brokers who are paid the six-cents per share commission and East West. There were entirely arms-length transactions between third parties over the apportionment of the six-cent fee. The board was given repeated notice of the total brokerage fee, six cents per share, in the hundreds of confirmations that were sent, at the board's direction, to the fund's custodian, LaSalle Bank. As the Board's agent, LaSalle Bank's knowledge is imputed to the Board. It is undisputed that the total fee of six cents was a reasonable fee. And the confirmations all started the commission rate. So there is no evidentiary support for the claim asserted in 27 (d).

Paragraphs 27 (e) complains that FMA breached its fiduciary duties by not informing the fund trustees that it was paying a referral fee to East West to secure and retain its

investment management contract with the fund. I did not see a shred of evidence that FMA ever paid East West a referral fee or that use of East West was a condition of FMA's contract with the fund. There was alot of argument about it and some characterizations of the evidence. But I certainly did not see any evidence that would support a conclusion, based on a preponderance of the evidence, that there were referral fees or that use of East West was a quid pro quo for FMA's business dealings with the trust fund.

And with respect to the suggestion in various arguments and questions that FMA would not have obtained the fund's business unless it used East West, I refer to the testimony of Trustee Corcoran. The board made an independent decision after FMA's two presentations, and the decision to retain FMA was not a result of any pressure by Trustee Close.

Paragraph 27 (f) complains that FMA breached paragraph 2.04(b) of its contract with the fund by using East West for reasons other than, "...the statistical data, research and other services supplied by East West..." This is just a reiteration of the claims made in subparagraph (e). For the same reasons, I find that there is a failure of evidence on this claim.

Paragraph 27 (g) alleges that FMA breached its fiduciary duties by failing to timely identify East West as a broker or dealer receiving fees on fund transactions made by FMA. Now, from this allegation I perceive, although it was not that clear to me in arguments made by counsel for the plaintiffs, that the gist of this complaint is that the relationship between FMA and East West was one of directed brokerage. Directed brokerage has a particular meaning, according to the testimony of plaintiffs' expert, Mr. Berkowitz, within the securities industry. The contractual disclosure requirements set forth in these particular provisions of the amendment to the asset management agreement require specific disclosure of directed brokerage arrangements and soft dollar arrangements.

There was overwhelming evidence that the relationship between FMA and East West was not a directed brokerage

arrangement as that term is used in the securities industry. There was some semantical confusion. According to the testimony, Trustee Close never — and he would not have the authority to do this — made the retention of East West a condition of FMA doing business with the board. He would not have that authority by overwhelming and uncontroverted testimony. The typical directed brokerage arrangement is where the directed broker acts as the custodian of the stock. East West was never a custodian of the fund's assets. The board selected its own custodian, LaSalle Bank, and the board designated LaSalle to receive its confirmations. Plaintiffs' Exhibit 125, FMA's new account form for the fund, indicates this was not to be a directed broker account. Moreover, board never authorized FMA to enter a direct brokerage arrangement, which would relieve FMA of some of its fiduciary obligations to the pension fund. In fact, the theory that there was a directed brokerage arrangement is contrary to the breach of fiduciary obligation claims that the plaintiffs have also asserted here. The buck still stops with FMA in terms of fiduciary responsibilities in the case. There is an insufficient basis to conclude that there was a directed brokerage relationship.

FMA decided to use East West as an introducing broker on a best execution basis and did not, in fact, use East West for 100 percent of its transactions on behalf of the fund. Clearly, they used East West for the vast majority, somewhere between 80 and 90 percent. But there certainly was not a direct brokerage relationship in the sense that that term is used in the industry. The fact that Trustee Close introduced and recommended or requested East West be used would not create a direct brokerage relationship. FMA remained free to select an introducing broker, using its own discretion, subject to the best execution standard and FMA's own extensive fiduciary responsibilities, which the plaintiffs would be the first to affirm that FMA retained.

The plaintiffs have not offered any evidence that FMA failed to disclose the identification, fees and commissions of the clearing brokers who actually traded in the fund's assets

and who actually prepared the research. With one exception, FMA was not privy to the commission arrangements between the clearing brokers and East West. It is unreasonable to conclude that FMA somehow breached a fiduciary duty in not intruding itself into that relationship. In any case, there was no consequent loss because a six-cent fee, whether or not an introductory broker is used, was conceded throughout these proceedings as a reasonable fee.

There was a dispute in the testimony as to whether Mr. O'Malley, the fund's administrator, received Plaintiffs' Exhibit 22. This is a curious letter purportedly from Mr. Carr to Mr. O"Malley dated June 21, 1994, about the same time the agreement between the parties was formalized. The letter requests board action as to whether East West would be approved as a directed broker. Mr. O'Malley testified that he never received the letter. Mr. Carr, on the other hand, claims he sent the letter or that it was mailed in the ordinary course of business.

As a threshold matter, I find Mr. O'Malley's testimony on this point more reliable, his ability to recall events clearer and more reliable than Mr. Carr's, and his explanation credible. I believe Mr. O'Malley's testimony that he did not receive Plaintiffs' Exhibit 22, particularly since it is undisputed that there was never any action taken by the board as a result of the letter, nor did Mr. O'Malley ever respond to the letter. Mr. Carr never made any follow-up inquiry as to why there was no response by the board. FMA never actually requested, nor did the board ever authorize East West to act as a designated broker, as that term is used in the securities industry. So perhaps the dispute over Plaintiffs' Exhibit 22 is a tempest in a tea pot. If anything, Plaintiffs' Exhibit 22 suggests that Mr. Carr, or whoever drafted the letter on his behalf, misunderstood the nature and responsibilities of a designated broker. He did not have the benefit of all the testimony we have had here over the last week.

Finally, paragraph 27 (h) complains, in a conclusory allegation, that FMA breached its fiduciary duties to the fund by making written misstatements of material facts and omitting

statements of material facts in written documents concerning the use of East West in FMA's soft-dollar transactions. There is no evidence in the record that FMA had a soft- dollar arrangement with East West. And I base this on the testimony of Mr. Mayer as well as Mr. Carr. This seems to be a matter of argument and not evidence. And because during arguments nothing else was mentioned with respect to this particular matter, I will move on.

In summary, with respect to all eight categories of alleged fiduciary breaches in Count 2, the plaintiffs have not sustained their burden of proof or persuasion, or shown any loss causally related to any of the alleged breaches.

Count 3 alleges FMA engaged in prohibited transactions in violation of Title 29, U.S. Code, Section 1106(a)(1)(c). That provision requires that,

> ... a fiduciary, with respect to a plan, shall not cause the plan to engage in a transaction if he knows or should know that the transaction constitutes a direct or indirect furnishing of goods or services or facilities between the plan and the party in interest...

The evidence failed to establish that East West was a party in interest. The commissions East West received as a result of the underlying stock transactions were negotiated at arms length between clearing brokers and East West. And, as I said earlier, FMA was not privy to these negotiations, nor did FMA determine what portion of those commissions East West would receive. Moreover, it was not shown that FMA had any control over the clearing brokers' decisions with respect to apportioning those commissions. Furthermore, there has not been any loss to the fund shown. The fund paid the industry standard rate to clearing brokers. The commissions were reasonable, and the use of East West was not shown to have increased that rate in any respect.

Finally, payment for bona fide services, including reasonable and necessary services such as the execution, clearing and research in equity stock transactions are exempt from

this particular ERISA provision prohibiting certain transactions. And I am relying on Title 29, U.S. Code, Section 1108(b)(2).

Count 4 is a similar count predicated on FMA's alleged participation in a prohibited transaction under Section 1106(a)(1)(d). This claim is based on permitting East West to receive commissions on equity transactions and spreads on fixed income transactions. This count, like Count 3, is based on the assertion that FMA paid commissions or caused commissions to be paid to East West. For the same reasons as to Count 3, there is a failure of proof. There has not been any showing that either East West was a party in interest or that it did not, in fact, provide reasonable and necessary services.

Count 5 alleges another prohibited group of transactions under 29 U.S. Code, Section 1106(a)(1)(d), and contends that East West received referral fees from FMA for obtaining plaintiffs' business and, therefore, these constituted prohibited transactions. As I have discussed in some detail as to Counts 2 and 3, no referral fees were paid. It has not been proven that FMA was required to use East West as an introducing broker in order to obtain and maintain the fund's large cap equity portfolio.

Count 6 complains of FMA's prohibited transactions, this time under 29 U.S. Code, Section 1106(b)(1). This claim appears to be based on a mischaracterization of East West's receipt of a portion of the clearing brokers' commissions as self-dealing by FMA. However, the evidence established that East West was a bona fide introducing broker. The plaintiffs have failed to establish that FMA's use of East West was not in the fund's best interests.

Count 7 is the last prohibited transactions claim against FMA, based on Title 29, U.S. Code, Section 1106(b)(2). Count 7 asserts that FMA engaged in prohibited transactions by causing commissions to be paid to East West because there was a conflict of interest between East West and the best interests of the fund. These are conclusory allegations without any

factual framework, and certainly without any evidentiary support in the record. The plaintiffs have not established there was a conflict of interest between East West and the best interests of the fund participants, or that FMA pursued any interests other than the fund participants' best interests when FMA made its investment decisions.

For the foregoing reasons, I am granting FMA's motion for judgment on partial findings.

In addition, Count 11, which is directed at East West, claims East West's participation in the prohibited transactions that are set forth in Counts 3 through 7 constitute a basis for imposing a constructive trust on East West's commissions. However, for all the reasons I stated with respect to the failure of evidence on Counts 3 through 7, a preponderance of the evidence does not support the plaintiff's claim that East West participated in prohibited transactions. Count 11 is a dependent count, it is totally dependent on Counts 3 through 7. On the court's own motion, judgment will be entered on behalf of East West on Count 11.

I appreciate your patience in listening to all this. I did not have time to draft an elegant opinion. I thought the trade-off between drafting an elegant opinion and getting the job done by reading all I had to read the last few days, given the hundreds of exhibits proffered by both sides and the trial testimony that at this point is around 1,000 pages, favored foregoing publication of an opinion in the Federal Supplement. I appreciate the fact that the parties have ordered daily copy. That has made my job easier. I shall have the court reporter write up my findings this afternoon, and I will go through and edit them tomorrow. You will have my findings and conclusions available for whatever further action each side deems appropriate. Based on my findings, judgment will be entered for the defendants and against the plaintiffs on all counts.

I am finished with all the defendant's exhibits. They are up here on the bench. I have most of plaintiffs' exhibit books still in chambers because, obviously, I have worked

mostly with the plaintiffs' exhibits. I have several books of the plaintiffs' exhibits out here on this desk, so you are free to take those. I want to pull out those exhibits containing my notations. I have this bad habit of writing on exhibits during a trial. While you might find my comments interesting, I do not think it would be appropriate to give you copies that I have marked up. But I will pull those out and make those books available to the plaintiffs. Thank you.

MR. CONWAY: Thank you, your Honor.

MR. GITTLER: Your Honor, excuse me.

THE COURT: Yes.

MR. GITTLER: The judgment itself, as I understand it, will not be entered today, that will await your written findings?

THE COURT: Well, no, those are my findings. The transcript will be written up. I do not know how soon the court reporter will be able to give me the transcript, but I will edit the findings as soon as she makes them available.

MR. GITTLER: The judgment, then, is dated today? That's the only point I want to understand.

THE COURT: I see, because the clock is ticking.

MR. GITTLER: Correct.

THE COURT: Well, let's say tomorrow, then.

MR. GITTLER: Tomorrow?

THE COURT: I won't enter the order until tomorrow.

MR. GITTLER: Tomorrow. Thank you.

THE COURT: All right.

Suzanne B. Conlon

United States District Judge

January 27, 2000

Appendix C

FRANK J. WSOL, SR., et al., Plaintiffs v. FIDUCIARY MANAGEMENT ASSOCIATES, INC., and EAST WEST INSTITUTIONAL SERVICES, INC., Defendants.

No. 99 C 1719

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2000 U.S. Dist. LEXIS 7546

May 30, 2000, Decided

June 1, 2000, Docketed

JUDGE:

Suzanne B. Conlon, United States District Judge.

OPINION:

MEMORANDUM OPINION AND ORDER

Judgment was entered for defendants Fiduciary Management Associates, Inc. ("FMA") and East West Institutional Services, Inc. ("East West") in this bench trial after the close of plaintiffs' case.[1] Plaintiffs, who are the present trustees of the International Brotherhood of Teamsters Union Local 710 Pension Fund, move for a new trial or relief from judgment on the grounds that (1) the court's failure to give "proper" weight to deposition testimony and admit related exhibits constitute denial of a fair trial; and (2) denial of a second extension of discovery and leave to file an amended complaint constitute denial of due process. Plaintiffs supplement their motion based on recent criminal indictments of non-parties who were also involved in the underlying investment transactions on behalf of the pension fund. From the indictments, plaintiffs presume the existence of unspecified evidence they speculate could have developed with

[1] East West failed to appear for trial. Plaintiffs declined to move for default judgment, but rather submitted its case on the merits against both defendants.

more discovery time.

I. DEPOSITION TESTIMONY

On March 24, 1999, a week after this case was filed, the court sent plaintiffs' counsel its standing order, which included the following with respect to use of deposition testimony at trial:

> Deposition testimony shall be presented by reading a written summary that excludes all colloquy and irrelevant matters. Unless otherwise ordered, counsel are to exchange written deposition summaries at least two weeks before trial. **Counsel are then to meet and work out any language problems before trial.** Evidentiary objections are to be noted by bracketing the objected to material and by a marginal notation briefly stating the basis of the objection (*e.g.*, speculation, cumulative, irrelevant, Fed.R.Evid. 403, etc.). [Emphasis in original].

PROCEDURES TO BE FOLLOWED IN CASES ASSIGNED TO JUDGE SUZANNE B. CONLON, pp. 5-6,[2]

The joint final pretrial order was presented in open court during a routine status and motion call. The court specifically inquired whether deposition summaries had been prepared; counsel for plaintiffs responded, "Yes, they are at the end of the designations." Tr. 1/6/00 at 4. An attorney for FMA added, "They're skeletal summaries." Id. A three-ring binder containing the voluminous pretrial order was handed up to the court during a discussion of various matters pertaining to the trial and pretrial motions. Id. at 1-11. The court did not review the pretrial order in open court, but relied upon counsel's representations that deposition summaries were provided. Nevertheless, plaintiffs now contend that because the court acknowledged counsels' representations that deposition summaries were prepared by saying, "Oh, I see." id at 4, the court tacitly approved "skeletal" summaries, and

[2] The standing order is also available on the court's website: www.ilnd.uscourts.gov.

then "repudiated its prior acceptance" on the first day of trial a week later. Pl. corrected memo at 2-3. This is simply not an accurate or fair characterization of the record.

The court did not have an opportunity to review the voluminous pretrial order in open court during its busy status and motion call. When the court reviewed the pretrial order just before trial, it could not find deposition summaries. Rather, the pretrial order listed 12 deponents with one or two sentences describing the general subject(s) of each deponent's testimony, followed by countless pages of designations and objections.[3] During the opening statement of plaintiffs' lead counsel, the court again inquired whether deposition summaries were prepared. Tr. 1/14/00 at 14. Counsel responded that the parties were only able to agree on one or two sentence summaries. Id. The court explained that the pretrial order submissions were inadequate "characterizations," not testimonial summaries. Id. Plaintiffs' counsel assured the court he would provide "digests" of the depositions. Id. At the end of the first trial day, before a three-day recess, the court again inquired regarding the depositions and described the standing order requirements in detail. Id. at 221. The court suggested counsel for the parties work together on the summaries over the three-day trial recess. Id. at 223. In response to plaintiffs' varied excuses for not complying with the standing order, the court noted that counsels' purported attempt to obtain pretrial "guidance" in preparing deposition summaries from a courtroom deputy clerk employed by the clerk's office was inappropriate. Id.When trial resumed three days later, plaintiffs failed to submit any deposition summaries. Plaintiffs' counsel informed the court that deposition summaries were being prepared and sent to defense counsel "over the last couple of days." Tr. 1/18/00 at 228. The court requested that deposition summaries be submitted as soon as each was completed. Id. Nevertheless, the following day no deposition summaries were submitted. The court

[3] For example, the one-sentence entries as to deponents Laura DeBruyne and David Muncie are identical, non-revealing statements that each testified "about the operations of Defendant East West." Pretrial Order, Ex. G.

warned plaintiffs' counsel that as the proponent of deposition testimony, it was plaintiffs' responsibility to either present the summaries in their case or to just rely on the one or two sentence general descriptions in the pretrial order. Tr. 1/19/00 at 611. Obviously, the "skeletal summaries" would have no probative value whatsoever.

On the fourth day of trial, no deposition summaries were submitted to the court. Yet counsel for plaintiffs referred to unsubmitted deposition testimony in arguing the admissibility of other evidence. Tr. 1/20/00 at 766. The court pointed out that the cited deposition testimony had not been submitted to the court, "and, again if it was important evidence, you should have prepared summaries ..." Id. In addition, the court pointed out that plaintiffs had not rested yet, and if they had more evidence, they should present it. Id. at 767. Nevertheless, plaintiffs decided to rest their case later that day. Id. at 812. Plaintiffs failed to submit a single deposition summary before they rested their case. Instead, plaintiffs' counsel merely proffered boxes of deposition transcripts, which the court declined to accept. The court gave counsel a final warning that the "sun would set" on his opportunity to submit summaries the following day at noon when arguments would be heard on a defense motion for entry of judgment. Id. at 814.

Just before arguments on the defense motion, plaintiffs informally sent to chambers via the court reporter three deposition summaries with defense objections and counter-designations and eight other summaries without any defense objections or counter-designations. These summaries were neither filed with the court nor tendered on the record. The court delayed its ruling after arguments on the defense motion so that it could review the tardy submissions. In later ruling on the motion, the court noted it considered the three deposition summaries and related exhibits that plaintiffs submitted to the defense even though the summaries failed to conform with the standing order; the court stated that it had read but could not give significant weight to the remaining incomplete summaries because they did not incorporate

defense counter-designations or objections. Tr. 1/25/00 at 929-32. The court explained that it could not determine whether plaintiffs' unilateral summaries were "a fair and complete contextual representation of the [deposition] testimony." Id. at 932.

Plaintiffs base their present motion on Rules 59(a) and 60(b)(4) of the Federal Rules of Civil Procedure. However, plaintiffs did not present, much less preserve, a deposition summary issue at trial. Plaintiffs neither contested the legitimacy of the court's standing order requirements nor did they claim before judgment that they had an inadequate opportunity to comply with the order. Instead, plaintiffs, who were represented by *five* experienced counsel,[4] asserted at trial that they were initially "confused" about the deposition summary requirement in the standing order, that they sought *ex parte* advice from court personnel,[5] and that defense counsel were uncooperative. But it is clear from the record that plaintiffs never prepared *any* deposition summaries before trial, nor did they tender summaries to defendants two weeks before trial, as explicitly required by the standing order. Although plaintiffs now attempt to place partial blame for their noncompliance on a courtroom deputy employed by the Clerk's Office, the purported opinion of a clerical employee that contradicted the clear terms of the standing order was not a reasonable basis for reliance. *See* Pl. corrected memo, Ex. 4, Angelucci Aff. P 7. In any case, the court admonished counsel the first day of trial for seeking advice from a clerical employee. The court then described in detail the deposition summary requirements and suggested summaries be prepared during the ensuing three-day trial recess. Plaintiffs fail to explain why they did not submit any summaries whatsoever until after they rested their case a week later. Nor do they explain why all but three tardy summaries - which the

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[4] In all, seven attorneys filed appearances on plaintiffs' behalf. R. 1.

[5] *See United States v. Kraus, 137 F.3d 447 (7th Cir. 1998)* (discussing impropriety of seeking advisory opinion from court employee about judge's likely reaction to attorney's proposal). At the direction of the Seventh Circuit, the Kraus opinion was circulated to all court staff.

court fully considered - failed to include any defense objections and counter-designations. While the court read all the untimely submissions, it could not place significant weight on the unilateral summaries. To do so would be equivalent to considering only a live witness' direct testimony without permitting opposing counsel to object or cross-examine the witness. Obviously, the reliability and probative value of testimony cannot be fairly tested under such a partisan approach.

FMA has analyzed the deposition summaries that were not given "significant weight" by the court to show that in substance the testimony was either cumulative or irrelevant to the issues before the court. FMA resp. at 12-14. As plaintiffs recognize, a new trial should only be granted "where substantial justice has not been done, resulting in harm to the movant." Pl. reply at 7, quoting *Romero v. Cincinnati Inc., 171 F.3d 1091, 1096 (7th Cir. 1999)*. Nonetheless, plaintiffs respond to FMA's factual analysis with sweeping conclusions and accusations lacking a rational connection with the court's Rule 52(a) findings. Plaintiffs fail to address how the court's refusal to give significant weight to incomplete, partisan summaries affected any specific court finding and thereby deprived plaintiffs of a fair trial. Accordingly, plaintiffs have not met their heavy burden under either Rule 59(a) or 60(b)(4) for establishing the right to a new trial or relief from judgment.

II. DISCOVERY DEADLINES

Plaintiffs argue that a ten-month discovery period was a denial of their right to "due process" because this case involved multimillion dollar ERISA claims of fiduciary breach and breach of contract arising from defendants' handling of Teamster pension fund investments. Pl. corrected memo at 11. The discovery schedule was set at the initial status hearing on April 14, 1999. Before setting the schedule, the court inquired about the parties' discovery needs, including the number of depositions anticipated. Tr. 4/14/99 at 2-3. Both plaintiffs and FMA estimated ten to twelve depositions;

in addition, plaintiffs stated there may be a need for forensic accountants and economic experts with respect to damage issues. Id, at 3-4. The court set a 180-day discovery period, with discovery to close on October 14, 1999. Id. at 5. Neither plaintiffs nor FMA objected to the explicitly firm discovery schedule. Id. When a month later FMA filed its second agreed motion for a brief extension of time to respond to the complaint, the court granted the motion with the condition that "all previously set dates stand." *See* Min. Order of 5/11/99.

Three months later, plaintiffs and FMA filed a joint motion to amend the scheduling order. As a result, the court extended the deadline for completion of discovery to November 15, 1999, with the condition that this was the final extension. *See* Min. Order of 8/18/99. Apparently not a single deposition was taken until September 1999, five months after the original scheduling order was entered. During a hearing in October 1999 on FMA's motion to compel responses to discovery requests served four months earlier, the court noted FMA's lack of diligence in enforcing its discovery rights. Tr. 10/7/99 at 3. The only "responses" plaintiffs had furnished to interrogatories served four months earlier were "oral." Id.[6] Plaintiffs attributed the lack of discovery activity to settlement negotiations and a desire to minimize attorneys' fees and costs. Id. This obvious lack of serious discovery activity prompted the court to warn that "discovery will not be extended again." Id at 5.

Even though discovery closed on November 15th, the parties agreed to continue taking depositions for two additional months; plaintiffs and FMA jointly moved to extend the filing of the final pretrial order from December 1999 to January 2000. R. 32. The court granted the motion as the "second final extension." R. 36. It appears from the record that most of the depositions in this case were taken either the month before the second discovery deadline (one month after

[6] Oral answers to interrogatories clearly do not comply with Fed.R.Civ.P. 33(b)(1) and (2), requiring answers to be made in writing, under oath, and signed by the person providing the answers

the first discovery deadline) or during the two months following the close of discovery.[7]

It is beyond dispute that a substantial amount of discovery was taken. However, it is also clear that the hyperactivity at and after the close of discovery may be attributed in large measure to the acknowledged lack of activity "to keep attorneys' fees and costs down" for the first six months of the discovery period. Last-minute frenzy was a known risk both sides undertook by their strategic decisions. From the first status hearing, all counsel were on notice the discovery schedule was firm; the court reasonably assumed its scheduling would be honored. *Spears v. City of Indianapolis, 74 F.3d 153, 157 (7th Cir. 1996).* More importantly, plaintiffs fail to identify any potential witness they were denied an opportunity to depose because of the discovery schedule or to explain in a non-speculative way how the outcome of the trial would probably have been different had plaintiffs been permitted to set their own discovery schedule. Thus, plaintiffs fail to make a clear showing that they have suffered actual or substantial prejudice. *Miksis v. Howard, 106 F.3d 754, 758 (7th Cir. 1997); Martel v. County of Los Angeles, 56 F.3d 993, 995* (7th Cir.), cert. den. *516 U.S. 944, 133 L. Ed. 2d 304, 116 S. Ct. 381 (1995).*

III. AMENDMENT OF THE COMPLAINT

A month before the second discovery deadline, plaintiffs moved for leave to file an amended complaint adding claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and naming five new defendants. R. 13. In the same motion, plaintiffs requested that the extended discovery schedule be vacated. Id. In denying the motion, the court noted that the motion was vague as to when plaintiffs acquired the information supporting their claims against five new defendants and that adding new parties and broad new claims would materially delay the trial. Tr. 10/7/99 at 5. The

[7] During the first seven months of the original eight months scheduled for discovery, plaintiffs took only one deposition; over the next three months, the parties took approximately 40 depositions. Pl. corrected mot., Ex. 2.

court then inquired whether a trial delay would be prejudicial to other parties. Id. at 6. Counsel for FMA responded that the new allegations would "exponentially expand the scope of the case" and would shift the focus of the case to individuals and transactions that had not been the subject of discovery; FMA alleged that the amended complaint would incorporate allegations asserted by plaintiffs in cases against other investment managers already pending before other judges. Id. at 6-7.[8] In short, the proposed amended complaint sketched a case far different in substance, scope and parties than the pending ERISA and breach of contract claims.

After an answer has been filed, a plaintiff may amend a complaint only with leave of court or with the written consent of the adverse party. Fed. R. Civ. P. 15(a). While Rule 15(a) requires that leave to amend a pleading be "freely given when justice so requires," appropriate considerations include undue prejudice to the opposing party and an undue delay in the proceedings. *Feldman v. American Memorial Life Insurance Company, 196 F.3d 783, 792 (7th Cir. 1999)*, quoting *Perrian v. O'Grady, 958 F.2d 192, 194 (7th Cir. 1992); Bohen v. City of East Chicago, Indiana, 799 F.2d 1180, 1183-84 (7th Cir. 1986).*

Plaintiffs conclude they were denied "due process" by this ruling. However, plaintiffs fail to mention that two weeks later, they simply filed their proposed amended complaint as a new case. *See* Wsol, et al. v. Carr, et al., 99 C 6834 (Judge Guzman). Nor do they mention that this court denied FMA's motion to enjoin plaintiffs from prosecuting the new RICO case before another judge. R. 35. In short, plaintiffs have not been denied the opportunity to litigate their RICO claims against FMA and other parties before another judge of this court. Thus, the assertion of a "due process" denial is frivolous.

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[8] *E.g.*, Frank J. Wsol, et al. v. Fleet Investment Advisors, et al., 99 C 1541 (Judge Anderson); *Frank J. Wsol, et al. v. Great Northern Management, et al., 114 F. Supp. 2d 720* (Judge Bucklo); Frank J. Wsol, et al. v. Main Street Investment Advisors, Inc., et al., 99 C 2088 (Judge Hibbler).

IV. THE CRIMINAL INDICTMENTS

After plaintiffs' post-trial motions were fully briefed, they were granted leave to file a supplemental memorandum based on two recent indictments of non-parties to this action who were involved in the investment decisions in this case. None of the parties in this case are named as defendants or as unindicted co-conspirators in the criminal cases. The indictments allege the defendants engaged in a racketeering conspiracy, which included unlawful payments to influence operations of employee benefit plans, money laundering, witness tampering and extortion. Plaintiffs argue that the criminal racketeering allegations are "indicative of the existence of evidence of precisely the kind ... that they should have had time to discover and then present to the court." Pl. suppl. memo at 2.

An indictment does not have any evidentiary value; it is merely an unproven accusation. The fact that a grand jury has found probable cause to believe that non-parties engaged in various corrupt activities has only a speculative relationship with the transactions at issue in this case. Plaintiffs are precluded by law from discovery of grand jury information and internal investigatory files. *See e.g.*, Fed. R. Crim. P. 6(e). The indictment itself affords no new basis for discovery on the issues in this case. To the extent plaintiffs argue that they were denied the opportunity to pursue viable RICO claims in this case, their focus is misdirected. Plaintiffs' RICO claims have been pending before another judge of this court for seven months after discovery closed in this case. Thus, they have had the opportunity to investigate and test the sufficiency of their RICO claims. Plaintiffs have not established they have been prejudiced or denied substantial justice.

CONCLUSION

Plaintiffs' motion for a new trial and relief from judgment is denied.

ENTER:

s:\Suzanne B. Conlon
United States District Judge
May 30, 2000

Appendix D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Michael W. Dobbins
Office of the Clerk
CLERK

Marvin Gittler
Asher, Gittler, Greenfield, Cohen & D'Alba
125 South Wacker Drive
Suite 1100
Chicago, IL 60606

Case Number: 1:99-cv-01719

Title: Wsol v. Fiduciary Mgt Assc

Assigned Judge: Honorable Suzanne B. Conlon

MINUTE ORDER of 6/15/00 by Hon. Suzanne B. Conlon:

Plaintiffs' motion for reconsideration of the court's denial of Plaintiffs' motion for new trial or relief from judgment and its judgment on partial findings is denied.

[86-1] Mailed notice

This docket entry was made by the Clerk on June 19, 2000

ATTENTION: This notice is being sent pursuant to Rule 77(b) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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Appendix E

FRANK J. WSOL, SR., et al., Plaintiffs, v. FIDUCIARY MANAGEMENT ASSOCIATES, INC. and EAST WEST INSTITUTIONAL SERVICES, INC., Defendants.

No. 99 C 1719

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2001 U.S. Dist. LEXIS 3414

March 19, 2001, Decided

March 20, 2001, Docketed

JUDGE:

Suzanne B. Conlon, United States District Judge.

MEMORANDUM OPINION AND ORDER

INTRODUCTION

Even though an appeal is pending, plaintiffs move to vacate this court's January 28, 2000 judgment in favor of defendants Fiduciary Management Associates ("FMA") and East West Institutional Services ("East West") and to order a new bench trial pursuant to Fed.R.Civ.P. 60(b)(2).[1] Plaintiffs, who are trustees suing on behalf of a union pension fund, predicate their motion on post-judgment events in a criminal case before another judge of this court. *United States v. Christopher Roach and Richard Tringale,* 00 CR 288 (Judge Norgle). Roach and Tringale are not parties in this case, nor are the defendants in this case, FMA and East West, named as defendants in the indictment. However, plaintiffs contend guilty pleas and plea agreements in the criminal case constitute newly discovered evidence that requires a new trial.On May 30, 2000 and June 12, 2000, this court denied plaintiffs' motions for a new trial and for reconsideration, respectively, based on the same indictment

[1] This motion is moot as to East West. Plaintiffs settled with East West and have moved the Court of Appeals to dismiss East West from this case. FMA surreply, Ex. A.

and the plea agreement of a former pension fund trustee in another criminal case in Massachusetts. Since these rulings, Roach and Tringale entered guilty pleas admitting the allegations in the indictment and have agreed to cooperate with the United States Attorney in future criminal and civil cases. Plaintiffs submit Roach's declaration (dated January 15, 2001 - one year after the bench trial), as well as Roach and Tringale's plea agreements and a transcript of their guilty plea hearing on December 20, 2000. Plaintiffs argue they are entitled to a new trial because this new evidence implicates FMA in the alleged fiduciary breaches and prohibited transactions that were the subject of this suit. Plaintiffs conclude that inculpatory statements by Roach and Tringale, and the Roach declaration, provide evidence that would likely cause a different result, at least as to FMA's successful Fed.R.Civ.P. 52(c) motion at the conclusion of plaintiffs' case.

LEGAL STANDARD

The court may provide relief from final judgment under Rule 60(b)(2) based upon newly discovered evidence that could not have been obtained through due diligence in time to move for a new trial under Rule 59(b). In order to meet the standards required by Rule 60(b)(2), plaintiffs must establish that: the evidence was discovered after trial; due diligence on plaintiffs' part to discover the new evidence; the evidence is not merely cumulative or impeaching; the evidence is material; and if the evidence were produced at a new trial, the result would probably be different. *Jones v. Lincoln Electric Co., 188 F.3d 709, 732 (7th Cir. 1999).* "Discovery" of new evidence presumes that the evidence was either in existence or pertains to facts that were in existence at the time of the trial. *See Daniels v. Pipefitters' Ass'n Local Union No. 597, 983 F.2d 800, 902-03 (7th Cir. 1993)*(underlying facts of newly discovered evidence must have existed at time of trial to meet Rule 60(b)(2) standard); *Gomez v. Chody, 867 F.2d 395, 405 (7th Cir. 1989)*(same).

ANALYSIS

A. Discovery after trial

It is beyond dispute that plaintiffs learned of the guilty pleas and plea agreements, as well as the declaration Roach signed for plaintiffs, after the bench trial in this case. But this alone does not satisfy the discovery after trial requirement. The guilty pleas, plea agreements and declaration did not exist when this case was tried. Rather, the question is: were the facts underlying this "new evidence" in existence at the time of trial?

Roach, who was the owner of East West, selectively invoked the Fifth Amendment during his pretrial deposition in this case. His present declaration irreconcilably contradicts his pretrial deposition testimony is several material respects. All Roach's statements were made under penalty of perjury.

(1) At his deposition, Roach denied that either he or East West had any oral or written agreements with FMA or Robert Carr, an FMA officer; in his affidavit, Roach attests that he, Carr, and a purportedly corrupt former pension fund trustee, William Close, agreed to participate in a scheme to divert FMA brokerage commissions for pension fund investments to East West. *Compare* Roach dep. at 160 *with* Roach decl. P 3.

(2) Before trial, Roach testified that he did not know how FMA became the pension fund's investment manager; now Roach declares that FMA agreed to divert brokerage commissions to East West in exchange for retention as the pension fund's investment manager. *Compare* Roach dep. at 442 *with* Roach decl. PP 3.

(3) Before trial, Roach denied under oath that Tringale was associated in any way with East West's business; now Roach attests that Tringale, his criminal co-defendant, was his "East West associate." *Compare* Roach dep. at 153 *with* Roach decl. P 3.

(4) Before trial, Roach denied there were any meetings or conversations between Tringale and Carr or between Tringale

and any pension fund trustee; Roach now attests that Tringale met with Carr and a pension fund trustee as part of the scheme in issue. *Compare* Roach dep. at 153, 155, 207, and 339 *with* Roach decl. P 3.

(5) Before trial, Roach testified that no one at FMA was aware of the details of East West's financial arrangements with the clearing firms that actually paid a portion of East West's commissions; now Roach swears that FMA agreed to direct brokerage commissions to East West in an amount equal to FMA's management fees. *Compare* Roach dep. at 435 *with* Roach decl. P 3, 5.

In sum, the proffered new evidence either impeaches Roach's purportedly false exculpatory statements available at the time of trial, or consists of post-trial statements that were *unavailable* at the time of trial because Roach and Tringale were unwilling to cooperate with plaintiffs. The new evidence was the direct product of two criminal defendants' decisions to plead guilty in exchange for sentencing benefits and, with respect to Roach, to settle plaintiffs' claims against his business, East West. Roach decl. P 8.

It is instructive that similar situations are not uncommon in criminal cases. After conviction at trial, defendants may move for a new trial under Fed.R.Crim.P. 33, which parallels and embodies the same standards as motions for new trial under Fed.R.Civ.P. 60(b)(2). A defendant may proffer post-trial testimony of a co-defendant, an alleged co-conspirator, or a non-party witness that reflects "new" information favorable to the defendant as the basis for a new trial. Courts have uniformly held that post-trial evidence from a witness who was unavailable - because the witness exercised the Fifth Amendment privilege not to testify or was otherwise unwilling to cooperate until after trial - does not constitute newly discovered evidence under Rule 33. *United States v. Theodosopoulos, 48 F.3d 1438, 1448-49 (7th Cir. 1995); United States v. Dale, 991 F.2d 819, 838-39 (D.C.Cir. 1993); United States v. Locke, 1999, 1999 WL 558130* (N.D.Ill.)(internal citations omitted). The rationale underlying this uniform view in criminal cases applies here: Roach's proffered post-trial tes-

timony does not qualify as newly discovered evidence. The finality of a judgment cannot be compromised by recruiting witnesses after trial whose earlier unavailability or uncooperativeness was predicated on their own criminal liability.

B. Due diligence

Plaintiffs must show they exercised due diligence to obtain the purported new evidence. They offer no explanation as to why they did not attempt to elicit Tringale's testimony at trial. Nor do they offer a declaration from Tringale that he is now willing to provide testimony that is material as to whether FMA breached its fiduciary duties or engaged in prohibited transaction. Rather, plaintiffs rely on inadmissible hearsay statements - not directly addressing FMA's conduct - that are contained in Tringale's plea agreement and admissions he made during his guilty plea colloquy. Thus, plaintiffs have not shown they exercised due diligence as to Tringale.

Plaintiffs explain they did not call Roach as a trial witness because during his deposition, he invoked the Fifth Amendment privilege against self-incrimination on all questions pertaining to pension funds. FMA argues that because Roach answered other substantive questions, he waived his Fifth Amendment privilege. According to FMA, this shows that plaintiffs were not diligent because they made no attempt to compel Roach's deposition answers and trial testimony on issues relating to pension funds and the transactions and events in issue at trial. Instead, plaintiffs unsuccessfully attempted to persuade the court to draw an adverse inference *against FMA* based upon Roach's silence.

It is true that if a witness or deponent testifies voluntarily about a subject, he waives the privilege against self-incrimination as to any details relating to that subject. *Mitchell v. United States, 526 U.S. 314, 321, (1999)* (internal citations omitted). Determining the boundaries of a waiver based on selective invocation of the Fifth Amendment is problematic. *Id. at 321-22* ("Nice questions will arise ... about the

extent of the initial testimony and whether the ensuing questions are comprehended within its scope ..."). Apparently counsel consulted another judge of this court during Roach's deposition; the judge advised Roach to answer only those questions that Roach believed would not be incriminatory. Pl. reply, p. 6, n. 6. FMA's generalized approach to this difficult issue is not helpful: FMA does not identify specific answers to support a finding that the privilege was waived as to other specific questions. Thus, there is an insufficient basis to conclude that plaintiffs failed to exercise due diligence by not seeking judicial assistance to compel Roach to answer those questions to which he responded by invoking the Fifth Amendment.

C. Roach's credibility and the outcome of this case

The parties sharply disagree about the credibility and reliability of Roach's proffered declaration, which is appended to plaintiffs' motion. In his declaration, Roach not only contradicts some of the answers he did provide during his pretrial deposition, but he also inculpates FMA in unlawful transactions relating to management of pension fund investments.

Plaintiffs predicate Roach's credibility on his plea agreement with the United States Attorney and the incriminatory statements he made during his guilty plea.

The United States Attorney is not the guarantor of the truthfulness of criminal defendants who agree to plead guilty and to cooperate with authorities in exchange for a lesser sentence or other benefits. Indeed, this court is required to routinely caution jurors to consider "with caution and great care" the testimony of a witness who has either plead guilty to the conduct in issue or a witness who has received sentencing benefits. Seventh Circuit Criminal Jury Instruction 3.13, Witnesses Requiring Special Caution. Roach falls into both categories. Moreover, his settlement agreement to cooperate with plaintiffs and furnish his declaration in this case in exchange for dismissal of plaintiffs' claims against East West suggests a basis for bias and potential impeachment.

Finally, it is beyond question that Roach perjured himself either during his pretrial deposition or in his declaration by giving contradictory answers on material matters.

In view of these considerations, the court cannot conclude that Roach's recent declaration is unquestionably credible and trustworthy insofar as he now inculpates FMA in his criminal activities. Evidence advanced as a basis for a new trial under Rule 60(b)(2) must be credible. *Daniels, 983 F.2d at 802-03.* For the same reasons, the court cannot conclude that Roach's testimony at a retrial, if consistent with his present declaration, would probably change the outcome of this case.

CONCLUSION

Plaintiffs have not carried their burden of establishing all of the requirements for a new trial under Rule 60(b)(2). Accordingly, their second motion for a new trial must be denied.

ENTER:

March 19, 2001

s:\Suzanne B. Conlon

United States District Judge

Appendix F

ERISA § 404, 29 USCS § 1104 (2001)

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d), 4042, and 4044 [*29 USCS § § 1103*(c), (d), 1342, 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [*29 USCS § 1107*(d)(3)]), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5) [*29 USCS § 1107*(d)(4) and (5)]).

(b) Indicia of ownership of assets outside jurisdiction of district courts. Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership

of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary.

(1) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(A) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(B) no person who is otherwise a fiduciary shall be liable under this part [*29 USCS § § 1101* et seq.] for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(2) In the case of a simple retirement account established pursuant to a qualified salary reduction arrangement under section 408(p) of the Internal Revenue Code of 1986 [*26 USCS § 408*(p)], a participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account upon the earliest of—

(A) an affirmative election among investment options with respect to the initial investment of any contribution,

(B) a rollover to any other simple retirement account or individual retirement plan, or

(C) one year after the simple retirement account is established.

No reports, other than those required under section 101(g) [*29 USCS § 1021*(g)], shall be required with respect to a simple retirement account established pursuant to such a qualified salary reduction arrangement.

(3) [Caution: This paragraph applies to distributions made after final regulations implementing § 657(c)(2)(A) of Act June 7, 2001, P.L. 107-16 (*26 USCS § 401* note), are pre-

scribed, as provided by § 657(d) of such Act *(26 USCS § 401* note).] In the case of a pension plan which makes a transfer to an individual retirement account or annuity of a designated trustee or issuer under section 401(a)(31)(B) of the Internal Revenue Code of 1986, the participant or beneficiary shall, for purposes of paragraph (1), be treated as exercising control over the assets in the account or annuity upon—

(A) the earlier of the earlier of—

(i) a rollover of all or a portion of the amount to another individual retirement account or annuity; or

(ii) one year after the transfer is made; or

(B) if the transfer is made in a manner consistent with guidance provided by the Secretary.

(d) Fiduciary responsibility.

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of the Internal Revenue Code of 1986 [*26 USCS § 4980*(d)], a fiduciary shall discharge the fiduciary's duties under this title and title IV in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement-

(i) under section 4980(d)(2)(B) of such Code [*26 USCS § 4980*(d)(2)(B) with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of such Code [*26 USCS § 4980*(d)(2)(B)(ii) or (3)] with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement-

(i) under section 4980(d)(2)(A) of such Code [*26 USCS § 4980*(d)(2)(A)] with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of such Code [*26 USCS § 4980*(d)(2)(B)] with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of such Code [*26 USCS § 4980*(d)(2)(C)] with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection-

(A) any term used in this subsection which is also used in section 4980(d) of the Internal Revenue Code of 1986 [*26 USCS § 4980*(d)] shall have the same meaning as when used in such section, and

(B) any reference in this subsection to the Internal Revenue Code of 1986 [*26 USCS § § 1* et seq.] shall be a reference to such Code as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990 [enacted Nov. 5, 1990].

ERISA § 1105, 29 USCS § 1105 (2001)

(a) Circumstances giving to liability. In addition to any liability which he may have under any other provision of this part [*29 USCS § § 1101* et seq.], a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 404(a)(1) [*29 USCS § 1104*(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b) Assets held by two or more trustees.

(1) Except as otherwise provided in subsection (d) and in section 403(a)(1) and (2) [*29 USCS § 1103*(a)(1) and (2)], if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) or any other provision of this part [*29 USCS § § 1101* et seq.].

(3) (A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 403(a)(1) [*29 USCS § 1103*(a)(1)].

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities.

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named

fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 404(a)(1) [*29 USCS § 1104*(a)(1)]—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a).

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 402(c)(3) [*29 USCS § 1102*(c)(3)].

(d) Investment managers.

(1) If an investment manager or managers have been appointed under section 402(c)(3) [*29 USCS § 1102*(c)(3)], then, notwithstanding subsections (a) (2) and (3) and subsection (b), no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment

manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part [*29 USCS § § 1101* et seq.] for any act of such trustee.

ERISA § 1106, 29 USCS § 1106 (2001)

(a) Transactions between plan and party in interest. Except as provided in section 408 [*29 USCS § 1108]:*

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [*29 USCS § 1107*(a)].

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a) [*29 USCS § 1107*(a)].

(b) Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the inter-

ests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest. A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

ERISA § 408, 29 USCS § 1108 (2001)

(a) Grant of exemptions. The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 and 407(a) [*29 USCS § § 1106*, 1107(a)]. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this Act. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 406(a) or 407(a) [*29 USCS § 1106*(a) or 1107(a)], the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not

grant an exemption under this subsection from section 406(b) [*29 USCS § 1106*(b)] unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) Enumeration of transactions exempted from *29 USCS § 1106* prohibitions. The prohibitions provided in section 406 [*29 USCS § 1106*] shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of the Internal Revenue Code of 1986 [*26 USCS § 414*(q)]) in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of the Internal Revenue Code of 1986 [*26 USCS § 414*(u)(4)].

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 407(d)(6) [*29 USCS § 1107*(d)(6)]), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of quali-

fying employer securities (as defined in section 407(d)(5) [29 *USCS § 1107*(d)(5)]).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fidu-

ciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance

company. or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of this Act [*29 USCS § 1344*] (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of title IV [*29 USCS § § 1381* et seq.].

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 [*29 USCS § 1411*].

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if—

(A) the requirements of paragraphs (1) and (2) of subsection (e) are met with respect to such stock,

(B) on the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 407(d)(5) [*29 USCS § 1107*(d)(5)] as then in effect), and

(C) such stock does not constitute a qualifying employer security (as defined in section 407(d)(5) [*29 USCS § 1107*(d)(5)] as in effect at the time of the sale).

(13) Any transfer made before January 1, 2006, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of the Internal Revenue Code of 1986 [*26 USCS § 420*] (as in effect on the date of the enactment of the Tax Relief Extension Act of 1999 [enacted Dec. 17, 1999]).

(c) Fiduciary benefits and compensation not prohibited by *29 USCS § 1106*. Nothing in section 406 [*29 USCS § 1106*] shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is con-

sistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

(d) Owner-employees; family members; shareholder employees.

(1) Section 407(b) [*29 USCS § 1107*(b)] and subsections (b), (c), and (e) of this section shall not apply to a transaction in which a plan directly or indirectly—

(A) lends any part of the corpus or income of the plan to,

(B) pays any compensation for personal services rendered to the plan to, or

(C) acquires for the plan any property from, or sells any property to,

any person who is with respect to the plan an owner-employee (as defined in section 401(c)(3) of the Internal Revenue Code of 1986 [*26 USCS § 401*(c)(3)]), a member of the family (as defined in section 267(c)(4) of such Code [*26 USCS § 267*(c)(4)]) of any such owner-employee, or any corporation in which any such owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

(2) (A) For purposes of paragraph (1), the following shall be treated as owner-employees:

(i) A shareholder-employee.

(ii) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37) of the Internal Revenue Code of 1986 [*26 USCS § 7701*(a)(37)]).

(iii) An employer or association of employees which establishes such an individual retirement plan under section 408(c) of such Code [*26 USCS § 408*(c)].

(B) Paragraph (1)(C) shall not apply to a transaction which consists of a sale of employer securities to an employee stock ownership plan (as defined in section 407(d)(6) [*29 USCS § 1107*(d)(6)]) by a shareholder-employee, a member of the family (as defined in section 267(c)(4) of such Code [*26 USCS § 267*(c)(4)]) of any such owner-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in paragraph (1).

(C) [Caution: This subparagraph applies to years beginning after Dec. 31, 2001, pursuant to § 612(c) of P.L. 107-16, which appears as a note to *26 USCS § 4975.*] For purposes of paragraph (1)(A), the term "owner-employee" shall only include a person described in clause (ii) or (iii) of subparagraph (A).

(3) For purposes of paragraph (2), the term "shareholder-employee" means an employee or officer of an S corporation (as defined in section 1361(a)(1) of such Code [*26 USCS § 1361*(a)(1)]) who owns (or is considered as owning within the meaning of section 318(a)(1) of such Code [*26 USCS § 318*(a)(1)]) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

(e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property. Sections 406 and 407 [*29 USCS § § 1106* and 1107] shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in sec-

tion 407(d)(5) [*29 USCS § 1107*(d)(5)]) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 407(d)(4) [*29 USCS § 1107*(d)(4)])—

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 407(e)(1) [*29 USCS § 1107*(e)(1)]),

(2) if no commission is charged with respect thereto, and

(3) if—

(A) the plan is an eligible individual account plan (as defined in section 407(d)(3) [*29 USCS § 1107*(d)(3)]), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 407(a) [*29 USCS § 1107*(a)].

(f) Applicability of statutory prohibitions to mergers or transfers. Section 406(b)(2) [*29 USCS 1106*(b)(2)] shall not apply to any merger or transfer described in subsection (b)(11).

ERISA § 409, 29 USCS § 1109 (2001)

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [*29 USCS § 1111*].

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

ERISA § 502, 29 USCS § 1132 (2001)

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [*29 USCS § 1109*];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [*29 USCS § 1025*(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) or under subsection (i) or (l);

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section

609(a)(2)(A) [*29 USCS § 1169*(a)(2)(A)]);

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1) [*29 USCS § 1021*(f)(1)], (A) to enjoin any act or practice which violates subsection (f) of section 101 [*29 USCS § 1021*(f)], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title [subtitle] or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions.

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1986 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [*29 USCS § § 1051* et seq., § § 1081 et seq.] (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a

request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515 [*29 USCS § 1145*].

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 [*29 USCS § § 1181* et seq.] against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 733(a)(1) [*29 USCS § 1191b*(a)(1)]). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form.

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 or section 101(e)(1) [*29 USCS § 1166*(a)(1) or (4) or § 1021(e)(1)] with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $ 100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $ 1,000 a day from

the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 101(b)(4) [*29 USCS § 1021*(b)(4)]. For purposes of this paragraph, an annual report that has been rejected under section 104(a)(4) [*29 USCS § 1024*(a)(4)] for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 101(d) [*29 USCS § 1021*(d)] with respect to any participant or beneficiary or who fails to meet the requirements of section 101(e)(2) [*29 USCS § 1021*(e)(2)] with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $ 100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $ 1,000 for each violation by any person of section 101(f)(1) [*29 USCS § 1021*(f)(1)].

(5) The Secretary may assess a civil penalty against any person of up to $ 1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 101(g) [*29 USCS § 1021*(g)].

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 104(a)(6) [*29 USCS § 1024*(a)(4)], the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $ 100 a day from the date of such failure (but in no event in excess of $ 1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under

section 1144(c)(8) of the Social Security Act [*42 USCS § 1320b-14*(c)(8)].

(d) Status of employee benefit plan as entity.

(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 101(f)(1) [*29 USCS § 1021*(f)(1)]. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The dis-

trict courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions.

(1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 *[29 USCS § 1145]* in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1986 *[26 USCS § 6621]*.

(h) Service upon Secretary of Labor and Secretary of the Treasury. A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an

action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle [*29 USCS § § 1101* et seq.]. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty. In the case of a transaction prohibited by section 406 [*29 USCS § 1106]* by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of the Internal Revenue Code of 1986 [*26 USCS § 4975*(f)(4)]) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of such Code [*26 USCS § 4975*(f)(5)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [*26 USCS § 4975*(e)(1)].

(j) Direction and control of litigation by Attorney General. In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor. Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of

the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries.

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 [*29 USCS § § 1101* et seq.] by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9)) without severe financial hardship unless such waiver

or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986 [*26 USCS § 4975*].

(m) Penalty for improper distribution. In the case of a distribution to a pension plan participant or beneficiary in violation of section 206(e) [*29 USCS § 1056*(e)] by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $ 10,000 for each such distribution.

Supreme Court, U.S.
FILED
FEB 11 2002
CLERK

(2)

No. 01-887

IN THE

Supreme Court of the United States

FRANK J. WSOL, SR., HUGH M. CORCORAN, ROBERT N. FALCO, NEIL J. LONDON, CHARLES SCHMALZ, PHILLIP STANOCH, AS TRUSTEES OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION LOCAL NO. 710 PENSION FUND, AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION LOCAL NO. 710 PENSION FUND,

Petitioners,

v.

FIDUCIARY MANAGEMENT ASSOCIATES, INC. AND EAST WEST INSTITUTIONAL SERVICES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT FIDUCIARY MANAGEMENT ASSOCIATES, INC.

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STATEMENT PURSUANT TO RULE 29.6

Respondent Fiduciary Management Associates, Inc. is directly or indirectly wholly owned by Old Mutual (US) Holdings Inc., a non-public company, which in turn is directly or indirectly wholly owned by Old Mutual plc, a public company.

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REASONS FOR DENYING THE WRIT

I. The Fund's "Questions Presented" Incorrectly Describe The Proceedings Below And, In Any Event, Were Waived By The Fund

The Statement of the Questions Presented by the Fund[1] is fatally flawed. First, the Questions Presented incorrectly describe the proceedings below. Pursuant to Supreme Court Rule 15.2, Respondent Fiduciary Management Associates, Inc. ("FMA") objects that the Questions Presented do not accurately reflect what occurred in the proceedings in the United States District Court and in the United States Court of Appeals for the Seventh Circuit. Second, the Questions Presented were not the focus of the proceedings below and are waived.

A. Misstatements Permeate The Questions Presented

The entire premise of the Questions Presented is in the opening line in which the Fund states that the Seventh Circuit "accepted as a fact" that the fiduciary had participated in a kickback scheme with crooked trustees. (Pet. i) This assertion is a serious misstatement. In this case, the District Court conducted a non-jury trial and made extensive findings of fact which exonerated FMA from any claim of breach of fiduciary duty or wrongdoing and negated the very premise underlying the Questions Presented. (Pet. B-1 through B-21) The questions assume the fact that FMA knowingly

1. The "Fund" is the terminology used by Petitioners Frank J. Wsol, Sr., Hugh M. Corcoran, Robert N. Falco, Neil J. London, Charles Schmalz, Phillip Stanoch, and the International Brotherhood of Teamsters Union Local No. 710 Pension Fund to describe themselves in the petition.

collaborated with a "shady introducing broker" (Pet. i), East West Institutional Services, Inc. ("East West"), to pay kickbacks to Fund trustees.

However, the District Court found to the contrary. Specifically, the District Court found, as a fact which is reviewed under the clearly erroneous standard, that there was not "a shred of evidence that FMA ever paid East West a referral fee or that use of East West was a condition of FMA's contract with the fund." (Pet. B-15) The District Court also found there was no "quid pro quo" that FMA use East West to get the Fund's business. *Id. See also* Pet. B-19 ("no referral fees were paid.")

Finally, the District Court concluded that the retention of FMA was not the result of any pressure from the allegedly crooked trustee, as the other Fund trustees, who comprised a controlling majority of the board, made their own independent decisions to hire FMA. (Pet. B-15) The issue of kickbacks to the trustees was never raised at trial, much less supported by evidence at trial.

Following the trial, pursuant to Fed. R. Civ. P. 60(b), the Fund sought a new trial based upon allegedly newly-discovered evidence related to the subsequent criminal prosecution of a dishonest trustee and the principals of East West. The District Court, which was the original finder of fact, reviewed the Fund's proffered evidence of FMA's knowledge of, and participation in, alleged kickbacks to Fund trustees and found it not to be believable. Specifically, the District Court denied two motions for a new trial, finding that the Fund's evidence was not credible (Pet. E-6) and would not have altered the outcome of the trial. (Pet. C-1 to E-7) While the Fund appealed all of these

rulings, the Seventh Circuit did not set aside any of the District Court's findings, whether made at trial or in the denial of the Fund's post-trial motions.

Accordingly, no justification exists for the Fund's representation to this Court in its Questions Presented that the Seventh Circuit "accepted as a fact" the Fund's assertion that FMA knowingly participated in a kick-back scheme. This representation is the opposite of the findings actually made by the District Court. The Seventh Circuit explicitly noted that the District Court had found that FMA had exercised all due care in its dealing with the Fund. (Pet. A-3) Furthermore, the Seventh Circuit upheld the District Court's finding that the Fund received best execution of its securities trades and received the same value for its six-cents-per-share brokerage commission payments as the Fund would have received "in a market free of kickbacks and undue influence." (Pet. A-4) Finally, the Seventh Circuit found that any claim that the Fund failed to receive valuable investment information for its six-cents per share brokerage commission failed for lack of factual proof at trial. (Pet. A-5) In no sense did the Seventh Circuit "accept as a fact" any wrongdoing by FMA.

The Seventh Circuit did hypothesize that even if this were not so and the information supplied in the Fund's second Fed. R. Civ. P. 60(b) motion were credited, the Fund would not prevail. But this assumption in no way disturbed, much less set aside, the District Court's findings of fact that FMA achieved best execution, engaged in no prohibited transactions and acted in the best interests of the Fund at all times. (Pet. B-1 to B-20) For the Fund, in its Questions Presented, to suggest that the Seventh Circuit "accepted as a

fact" that FMA had violated fiduciary duties has no support in the record and fatally taints the Questions Presented advanced in the petition.

The Questions Presented also misstate the Seventh Circuit's legal ruling. In the lower courts, the Fund sought relief only under the first two clauses contained in § 409(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1109(a), relating to (i) losses suffered by a plan as a result of a breach of fiduciary duty, and (ii) profits made by a fiduciary resulting from its use of plan assets. (Section 409(a) is reprinted at Pet. F-15) The Fund never argued the third clause of § 409(a), providing that a fiduciary "shall be subject to other equitable or remedial relief as the court may deem appropriate." *Id.* Accordingly, neither the District Court nor the Seventh Circuit was asked to address whether disgorgement of FMA's management fee was available under the third clause providing for equitable or remedial relief.

As to the first clause of § 409(a), the District Court found as a fact that the Fund suffered no loss (Pet. B-10 to B-11, B-18), and the Seventh Circuit upheld this finding. (Pet. A-4) The Fund acknowledges this. (Pet. 7-8) As to the second clause relating to profits of the fiduciary through use of plan assets, the District Court found that FMA's management fee was reasonable (Pet. B-5), and the Seventh Circuit echoed this finding: "Nor is it contended that FMA's management fee was excessive . . ." (Pet. A-5) The Fund has not disputed this finding either.

The second clause of ERISA § 409(a) provides for recovery of profits if the fiduciary has used plan assets for a personal benefit or has earned a higher profit than it otherwise

would have earned, absent a breach of fiduciary obligation. Since the facts found at trial established that neither of these circumstances, in fact, had occurred, the Seventh Circuit correctly found the Fund had no right to recover profits from FMA. The Seventh Circuit's articulation of two circumstances in which a fiduciary would be liable for disgorgement of profits, *i.e.* if a fiduciary appropriated fund assets or made risky investments of fund assets so as to maximize the fiduciary's fees (Pet A-6), are illustrative of conduct giving rise to recovery under the second clause of § 409(a). The Seventh Circuit, however, did not limit the remedy of recovery of profits to these two examples.

Contrary to the premise of the Questions Presented, the Seventh Circuit never said that § 409(a) as a whole, or even the second clause of § 409(a), applied only in two scenarios. Rather, the Seventh Circuit added a third, flexible scenario under which a plan could recover if the fiduciary annexed a "profit opportunity" and obtained additional profits from "what they would have been had there been no breach of fiduciary duty." (Pet. A-6) But as to this third category, the Seventh Circuit affirmed the District Court's fact finding that this did not occur as to FMA: "There is no evidence that FMA obtained a profit that it would not have obtained but for the alleged breach of its fiduciary obligation." (Pet. A-5)

These serious misstatements about the proceedings below warrant denial of a writ of certiorari as to the Question Presented advanced in the Fund's petition.

B. In the Lower Courts, The Fund Did Not Argue The Legal Issue Showcased In The Questions Presented

Equally important, the Fund never relied upon the third clause of § 409(a), relating to equitable or remedial relief, at any juncture of proceedings in the District Court or Seventh Circuit, although it is the centerpiece of the petition for certiorari. (Pet. 12-19, 21-24)

In the Fund's argument in the District Court in opposition to FMA's motion for judgment on partial findings, the Fund only relied upon the "losses" and "profits" clauses of § 409(a), with not a word about the equitable or remedial relief clause. Specifically, the Fund's attorney identified only two categories of relief under § 409(a) in his legal argument to the District Court:

> And I would refer your Honor to Section 409 of ERISA, 29 U.S.C. Section 1109, which I've handed up a copy of that as well.
>
> And that section provides not one but two ways, two mechanisms, if you will, to establish damages. If a loss is incurred, there are damages. If, under other circumstances, you can obtain profits, those are also damages. (Tr. 903).

A few minutes later, the Fund's counsel again directed the District Court only to the first two remedies under § 409(a) (losses and profits), never raising the third category of "equitable or remedial relief" which is raised so prominently here.

> But refer to 409. There are two different forms of damages there, and the question is can we recover either one of them. (Tr. 905).

In the briefing to the Seventh Circuit, no argument was based upon the third clause of § 409(a). Similarly, the Fund never cited *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S. Ct. 2063 (1993), so heavily relied upon in the petition, in any of the four briefs filed by the Fund in the Seventh Circuit. Since the Seventh Circuit addressed only the two clauses of § 409(a) raised by the Fund on appeal, the Seventh Circuit did not address, nor had reason to address, the circumstances under which a plan may be entitled to equitable or remedial relief under § 409(a). Moreover, the Fund did not ever make the argument, showcased in its petition (Pet. 15-16), that such equitable or remedial relief is mandatory. It is not appropriate for the Fund to ask this Court to review Questions Presented as to whether any remedy may exist under a clause of § 409(a) that was not raised in the lower courts.

II. This Is A Fact-Based Dispute Raising No Legal Issue Warranting Supreme Court Review

The proceedings below focused on the facts, not the law. As the District Court recognized, the Fund did not dispute FMA's explanation of the governing ERISA legal standards.[2]

---

2. The District Court correctly stated that the Fund bore the burden of proving "a breach of duty, loss, and causal relationship between the breach of duty and the loss." (Pet. B-11) Here and elsewhere (Pet. B-8), the Fund in its appendix erroneously misquotes the Court's ruling by substituting "casual" for "causal."

Specifically, the District Court stated in issuing its ruling in favor of FMA at the close of plaintiff's case-in-chief that while there were "dramatic differences in the analysis of the evidence and inferences to be drawn", there was no dispute between the parties as to the legal elements of each ERISA count. (Pet. B-1 to B-2) This case was, and is, a fact-based dispute. The District Court found the facts in favor of FMA. In the conclusion of its opinion, the District Court stated: "The plaintiffs have not established there was a conflict of interest between East West and the best interests of the fund participants, or that FMA pursued any interests other than the fund participants' best interests when FMA made its investment decisions." (Pet. B-20) The District Court also found that the Fund suffered no loss. (Pet B-10 to B-11, B-18)

The Seventh Circuit did not disturb the District Court's findings of fact that (i) FMA had exercised all due care (Pet A-3), (ii) the Fund had suffered no loss as a result of FMA's conduct (Pet. A-3), (iii) the Fund obtained best execution of its equity trades at the standard market price (Pet. A-4), and (iv) FMA received no profit as a result of any breach of fiduciary duty. (Pet. A-5) In upholding under the clearly erroneous standard the District Court's finding that the Fund did not overpay commissions by using East West, the Seventh Circuit considered not only the evidence adduced at trial, but also "the additional evidence that the plaintiffs presented in their 60(b) motion." (Pet. A-4)

This Court has expressed repeatedly its reluctance to disturb a trial court's findings of fact, which here the Court of Appeals has not set aside. *Rogers v. Lodge*, 458 U.S. 613, 623, 102 S. Ct. 3272, 3278 (1982) ("The Court of Appeals did not hold any of the District Court's findings of fact to be

clearly erroneous, and this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts."). Here the critical factual findings fully and independently support the judgment below.

If certiorari were granted, FMA would rely on this factual record as alternative grounds to support the judgment below. *See Blum v. Bacon*, 457 U.S. 132, 137 n.5, 102 S. Ct. 2355, 2359 n.5 (1982) ("an appellee may rely upon any matter appearing in the record in support of the judgment below.") *See also Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419, 97 S. Ct. 2766, 2775 (1977).

III. The Seventh Circuit's Decision Does Not Conflict With This Court's Precedent

Despite the Fund's vain efforts to distort this Court's prior decisions interpreting ERISA, no conflict exists between the Seventh Circuit's decision below and this Court's ERISA precedent. To the contrary, to the extent this Court's prior ERISA decisions speak to the issue decided by the Seventh Circuit, the lower court decision is consistent.

ERISA § 409(a) is one of ERISA's many enforcement provisions. Section 409(a) focuses on the remedies available to a plan when the plan's fiduciary violates a provision of ERISA. Specifically, § 409(a) provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to [1] make good to such plan any losses to the plan resulting from each such breach, and [2] to restore

> to such plan any profits of such fiduciary which have been made through the use of assets of the plan by the fiduciary, and [3] shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.[3]

29 U.S.C. § 1109(a) (bracketed numbers added).

Succinctly put, the Fund claims that, assuming FMA did breach its fiduciary duties and engage in prohibited transactions (an assumption not supported by the District Court's factual findings), the Seventh Circuit has incorrectly interpreted the second and third clauses of § 409(a) – the "profits" clause and the "equitable or remedial relief" clause. The Fund asserts that it is entitled to its requested remedy – a judgment equal in amount to the fees FMA earned for performing its investment management services for the Fund – even though FMA never improperly used Fund assets or engaged in risky investments to maximize FMA's fees. (Pet. A-5 to A-6)

The Fund's erroneous argument springs from the false premise that ERISA's purpose and prior decisions from this Court *compel* an ERISA remedy whenever there is an ERISA violation. The Fund phrases this theory in the form of an *"if-then"* proposition – *if* FMA violated ERISA, *then* the Fund is entitled to a monetary recovery under ERISA from

3. Tellingly, when the Fund quoted this statutory provision in its opening brief in the Seventh Circuit, the Fund omitted the language "shall be subject to" in clause 3, substituting ellipses for the absent words. (Fund Br. at 45) Yet these are words which the Fund argues (albeit wrongly) remove the court's discretion in awarding equitable relief and make relief compulsory. (Pet. 15)

FMA. (*See* Pet. 13) The Fund decries the Seventh Circuit's opinion as causing uncertainty, since "[w]here ERISA's broad remedies had once been (seemingly) mandated and unquestionably dispensed, the Seventh Circuit's decision invites reconsideration and engenders confusion on many levels. . . . [and] conflicts in principle with several United States Supreme Court decisions", primarily *Mertens v. Hewitt Associates*, 508 U.S. 248, 261-62, 113 S. Ct. 2063, 2071 (1993). (Pet. 10)

The Fund's contention is meritless. The Seventh Circuit correctly applied existing ERISA law in a manner consistent with this Court's precedent.

A. The Seventh Circuit's Decision Does Not Conflict With *Mertens*

If the Fund had thought *Mertens* to be relevant to the proceedings below, surely the Fund would have cited it at least once in the four briefs the Fund filed in the Seventh Circuit. The Fund never did – not once. Yet in the petition, the Fund cites *Mertens* repeatedly. (Pet. 10, 16, 17-23, 25)

Tellingly, the Fund does not argue that the Seventh Circuit's ruling conflicts with the holding in *Mertens*. Such an argument would be groundless. In *Mertens*, this Court addressed the question of whether ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty.[4] This Court held that

4. Unlike this case, the parties in *Mertens* assumed an ERISA violation had occurred. 508 U.S. at 254, 113 S. Ct. at 2067. Here, the District Court held that no ERISA violation had been proven, and FMA relies upon that judicial finding in this Court.

§ 502(a)(3) does not authorize such suits against nonfiduciaries. This Court rejected the petitioners' pleas that the Court's construction of the statute would leave beneficiaries like petitioners with less protection than existed before ERISA, and would contradict ERISA's basic goal of promoting the interests of employees and plan beneficiaries. 508 U.S. at 261-62, 113 S. Ct. at 2071.

Applying a straightforward statutory analysis, this Court refused to accept petitioners' "strained interpretation" of § 502(a)(3) in order to achieve ERISA's purpose of protecting plan participants and beneficiaries. *Id.* This Court pointed out that ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests – not all in favor of potential plaintiffs." *Id.* Accordingly, this Court held that the "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of [ERISA's] text regarding the *specific* issue under consideration." *Id.* (emphasis in original)

Mertens neither addressed the specific statutory provision addressed by the Seventh Circuit below, nor did it address actions against fiduciaries, as did the Seventh Circuit. Unlike § 502(a)(3) addressed by *Mertens*, § 409(a) addressed by the Seventh Circuit expressly provides for the *type* of relief requested by the Fund, disgorgement of "profits . . . made through use of assets of the plan by the fiduciary . . ." 29 U.S.C. § 1109(a). However, the Seventh Circuit held that the Fund was not entitled to this type of relief based on the facts of the case, as decided in a trial.

Rather than argue a direct conflict between the Seventh Circuit's holding below and this Court's holding in *Mertens*, the Fund makes the more tenuous argument that the lower court opinion "conflicts with the reasoning of *Mertens*."

(Pet. 17) One commentator has noted that a conflict in general principles really is no conflict at all for purposes of the criteria for a grant of certiorari and "any effort to mislead the Court into viewing a conflict in principle as a real conflict is almost invariably futile." STERN, GRESSMAN, SHAPIRO AND GELLER, SUPREME COURT PRACTICE 168 (7th ed. 1993).

Even this contention by the Fund is mistaken, as no "conflict in reasoning" exists between *Mertens* and the courts below. The Fund focuses on a narrow portion of the Court's *Mertens* opinion and then distorts its meaning. While the *Mertens* opinion did not address issues of liability under § 409(a), this Court did briefly mention § 409(a) in the context of discussing the scope and potential liability of fiduciaries under ERISA. This Court stated in pertinent part that under § 409(a), professional service providers who are fiduciaries "must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406". *Mertens*, 508 U.S. at 262, 113 S. Ct. at 2071-72. Relying on this language, the Fund claims that "[d]isgorgement of FMA's profits or fees, according to this Court's pronouncement, **must** be ordered. There are no qualifications. There is no discretion." (Pet. 18) (emphasis in original; footnote omitted) To the contrary, this Court's statement in *Mertens* simply reflects the plain language of the profits clause of § 409(a), stating that a fiduciary who engages in a breach of fiduciary duty or prohibited transaction shall restore "any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary . . ." 29 U.S.C. § 1109(a).

The Fund's claim of a conflict between the Seventh Circuit's decision and this Court's decision in *Mertens* is predicated on the false assertion that the Seventh Circuit

assumed FMA's participation in prohibited transactions under ERISA § 406, 29 U.S.C. § 1106. (Pet. 20-21) Not true. While the Seventh Circuit's opinion assumes, *arguendo* only, fiduciary breaches by FMA, the Seventh Circuit makes no mention whatsoever of § 406 or prohibited transactions generally. (Pet. A-1 to A-6) The Fund admits that the Seventh Circuit did not mention § 406. (Pet. 20-21 n.8)

Nothing in *Mertens* required the Seventh Circuit to disregard the plain language of § 409(a) and award a remedy to the Fund. Under *Mertens*, and under the language of the statute, a fiduciary is liable for profits obtained through participation in fiduciary breaches or prohibited transactions. The Seventh Circuit below correctly found that FMA's management fees were earned through FMA's own efforts, not through participation in any alleged fiduciary breaches or prohibited transactions. (Pet. A-5 to A-6)

Contrary to the Fund's position, ERISA is not a free-agent vehicle, with no fixed standard or guideline, to mete out punishment (in the form of transferring wealth from a fiduciary to a pension fund) when the Fund has lost nothing and the fiduciary gained nothing by some alleged misconduct. *Mertens* holds that ERISA strikes a careful balance which is not to be upset by case-by-case expansion of remedies. The Seventh Circuit's opinion in no way conflicts with this holding.

B. The Seventh Circuit's Decision Is Consistent With This Court's Other ERISA Precedents

While the Fund cites other ERISA precedents from this Court besides *Mertens*, the Seventh Circuit's decision is consistent with those decisions. In *Massachusetts Mutual Life*

Insurance. Co. v. Russell, 473 U.S. 134, 105 S. Ct. 3085 (1985) (Pet. 18), this Court denied a plan participant a remedy under § 409(a) in connection with a fiduciary's alleged breach, finding that a fiduciary's personal liability was to the plan, not to the participant. This Court rejected a "blue pencil" method of statutory interpretation of ERISA, involving the omission of "all words not part of the clauses deemed pertinent to the task at hand". 473 U.S. at 142, 105 S. Ct. at 3090. This is impermissible because it "ignores the relevant context in which statutory language subsists" and results in a "mode of interpretation [that] would render superfluous" some clauses of the section while slighting other language." *Id.* Consistent with *Russell*, the Seventh Circuit below gave effect to the entire language of the two clauses of § 409(a) invoked by the Fund and concluded that the Fund was unable to satisfy § 409(a)'s requirement that profits must be "made through use of assets of the plan" to justify disgorgement.

In *Varity Corp. v. Howe*, 516 U.S. 489, 490, 116 S. Ct. 1065, 1067 (1996) (Pet. 15, 17, 22, 27), this Court found that § 502(a)(3) authorizes a participant to seek individualized equitable relief against a fiduciary for a breach of the fiduciary's obligations. Notably, however, after finding that the plaintiffs were entitled to seek a remedy under the "other equitable relief" clause of § 502(a)(3), this Court reminded the petitioners and courts that the statute authorized only "*appropriate*" equitable relief:

> We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the "special nature and purpose of employee benefit plans," and will respect the "policy choices reflected in the inclusion of certain remedies and

> the exclusion of others." *Pilot Life Ins. Co.*, 481 U.S., at 54, 107 S. Ct., at 1556. *See also*, *Russell*, 473 U.S., at 147, 105 S. Ct., at 3092-3093; *Mertens*, 508 U.S., at 263-264, 113 S. Ct., at 2072 Thus, we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate."

516 U.S. at 515, 116 S. Ct. at 1079.

Similarly, in *Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 120 S. Ct. 2180 (2000) (Pet. 17, 21, 22), this Court, while holding that the "appropriate equitable relief" provisions of § 502(a)(3) authorize an action for restitution of property obtained by a nonfiduciary party who was a party-in-interest to a prohibited transaction, or disgorgement of proceeds and profits by such nonfiduciary if the property has already been sold, nonetheless emphasized that there are "limits" on such actions. 530 U.S. at 250, 120 S. Ct. at 2189-90. Although *Varity* and *Harris Bank* dealt with § 502(a)(3), rather than the § 409(a) addressed by the Seventh Circuit, the Seventh Circuit's decision is in harmony with those opinions by requiring faithful adherence to the statutory language.

Great-West Life & Annuity Insurance. Co. v. Knudson, __ U.S. __, 122 S. Ct. 708 (2002), also demonstrates the absence of conflict between the Seventh Circuit's decision and ERISA precedent from this Court. In *Great-West*, this Court held that § 502(a)(3), which authorizes plan participants and fiduciaries to bring civil actions to obtain "other appropriate equitable relief" to redress violations of a

plan, could not be relied upon to compel a plan beneficiary to make "legal" restitution to the plan for benefits the plan had paid. This Court held that it would be improper for courts to expand "the 'carefully crafted and detailed enforcement scheme' embodied in the text [of ERISA] that Congress has adopted." __ U.S. __, 122 S. Ct. at 718-19 (citing *Mertens*, 508 U.S. at 254, 113 S. Ct. 2063).

C. The Seventh Circuit's Decision Does Not Conflict With Supreme Court Precedent Dealing With The Common Law Of Trusts

The Fund also claims that the Seventh Circuit's decision conflicts with decisions from this Court applying the common law of trusts. This contention suffers from two infirmities. First, as this Court has expressly held, when common law trust concepts collide with the provisions enacted in ERISA, the statutory terms of ERISA prevail. Second, nothing in the Seventh Circuit's opinion contravenes basic trust law principles.

First, the Fund's assertion that "[i]n fashioning 'appropriate equitable relief' under ERISA § 409, a reviewing court must look to general 'principles of trust law' " (Pet. 21) is not accurate. In *Harris Trust*, this Court stated that the common law of trusts "offers a 'starting point for analysis [of ERISA] . . . [unless] it is inconsistent with the language of the statute, its structure, or its purposes.' " 530 U.S. at 250, 120 S. Ct. at 2189 (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447, 119 S. Ct. 755, 765 (1999)). Any inconsistent law derived from the common law of trusts must give way. Under § 409(a), appropriate "equitable" relief cannot be interpreted to include the disgorgement of "profits of such fiduciary which have been made through use of assets of the plan" (already provided

for in § 409(a)'s second clause), because that would make this statutory language redundant with the second clause of § 409(a). *See Mertens*, 508 U.S. at 257-58, 113 S. Ct. at 2069 (rejecting interpretation of ERISA that would render language superfluous).

Even if the common trust law cases cited by the Fund were instructive on the interpretation of § 409(a), those cases are not in conflict with the Seventh Circuit's decision below. None of those cases dealt with the situation here, where plaintiffs sought disgorgement of professional fees earned for *bona fide* services provided by FMA to the Fund.

In *United States v. Carter*, 217 U.S. 286, 297-98, 30 S. Ct. 515, 516 (1910) (Pet. 10, 21, 23), this Court ordered a U.S. Army captain who received kickbacks from contractors to whom he directed government business to disgorge those kickbacks. In *Magruder v. Drury*, 235 U.S. 106, 120-21, 35 S. Ct. 77, 82 (1914) (Pet. 21, 23), this Court ordered a trustee of an estate to disgorge commissions received on loans made out of assets of the estate. Notably, however, this Court refused to order disgorgement of commissions earned for services actually rendered to the estate by the trustee. 235 U.S. at 113, 35 S. Ct. at 79-80. In *Mosser v. Darrow*, 341 U.S. 267, 272-73, 71 S.Ct. 680, 682-83 (1951) (Pet. 21, 23, 29), this Court held the trustee of a reorganization trust to be liable for the profits made by trust employees through improper trading in securities of the debtors' subsidiaries. Finally, in *Crites, Inc. v. Prudential Insurance Co.*, 322 U.S. 408, 414-15, 64 S. Ct. 1075, 1079-80 (1944) (Pet. 21, 23), the Court ordered a receiver of mortgaged farms in a foreclosure proceeding to disgorge profits paid to him by a buyer of the foreclosed properties, reasoning that the receiver breached his duty of undivided loyalty to the seller of the properties in receiving compensation from the buyer.

By contrast, here there was no dispute below that FMA's money management fees – which the Fund agreed to in advance – were reasonable. (Pet. A-5, B-5) Nor was there any dispute that FMA provided valuable money management services to the Fund, which earned the Fund tens of millions of dollars. (Pet. B-5) Based on these core undisputed facts, the Seventh Circuit determined that FMA's management fees were not "profits of such fiduciary made through use of assets of the plan" under § 409(a). FMA was not the recipient of any "ill-gotten gains," which the Fund argues that *Carter*, *Magruder*, *Mosser*, and *Crites* proscribe. (Pet. 23-24) Indeed, in *Magruder*, this Court distinguished between reasonable fees earned through services rendered, which fiduciaries are allowed to keep, and ill-gotten gains made through use of plan assets, which must be disgorged. 235 U.S. at 113, 35 S. Ct. at 79-80. It is the former that the Fund claims must be disgorged, but nothing in this Court's precedent interpreting the common law of trust suggests such a result would be proper.

IV. The Seventh Circuit's Decision Does Not Conflict With Decisions From Other Courts Of Appeals

No conflicts exist among the Courts of Appeals either. No Court of Appeals has ordered under § 409(a) the disgorgement of a professional service provider's reasonable earned fees for services rendered on the premise that these fees are illicit "profits" made through use of assets of the plan. Yet this is the unprecedented result sought by the Fund.

One point merits attention at the outset. The Fund argues that three Court of Appeals decisions conflict with the Seventh Circuit below. Yet the Fund only cited one of these decisions, *Lowen v. Tower Asset Management, Inc.*, 829 F.2d

1209 (2d Cir. 1987), in the four briefs the Fund filed in the Seventh Circuit, and the Fund only cited that case once, in a reply brief. If the legal principles of these cases are so closely tied to the issues in this case to create an important conflict among the circuits, the Fund not only would have cited each of these cases, but would have discussed them at length in the lower courts. That never happened.

Of these three Court of Appeals cases, the Fund relies most heavily on *GIW Industries, Inc. v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 895 F.2d 729 (11th Cir. 1990) (Pet. 10, 24, 27), which the Fund never cited in the lower courts. In *GIW*, the Eleventh Circuit did not even address the issue of disgorgement of management fees that had been ordered by the trial court. There is no indication in the Eleventh Circuit's opinion that this issue was even raised on appeal. Instead, the Eleventh Circuit reviewed the trial court's award of hundreds of thousands of dollars in losses to the pension fund caused by the investment manager's fiduciary breaches. *Id.* at 733-34. By contrast, here the lower courts found that FMA caused no loss to the Fund, and the Fund no longer resists this judicial finding. Moreover, in *GIW*, the investment manager failed to even "obtain or read relevant Plan documents or the Plan booklet prior to investing" the fund's assets and causing a loss. *Id.* at 731. In a real sense, then, the investment manager in *GIW* never earned its fees. Conversely, FMA's management fees were reasonable, and, in exchange for those fees, FMA provided skilled, professional money management services resulting in a return to the Fund that exceeded the Fund's applicable performance benchmark.

The Fund also claims a conflict between the Seventh Circuit's decision and the Second Circuit's decision in *Lowen*.

(Pet. 10, 18, 25, 27) In *Lowen*, unlike here, the money manager invested the plans' assets in companies in which one or more defendants owned an interest or from which one or more defendants received fees or other consideration. The investments caused the plans to lose $20 million. 829 F.2d at 1211-12. The trial court ordered disgorgement of fees and commissions received by defendants in connection with the investment of the plans' assets in companies in which the defendants had a personal interest. *Id.* at 1214, 1222. Here, FMA invested the Fund's assets in publicly-held securities. FMA's management of the Fund's assets was – and was found in the trial court to be – astute, proper, and profitable for the Fund.

Finally, the Fund asserts a conflict between the Seventh Circuit's decision and *Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406 (9th Cir. 1988). (Pet. 10, 11, 19, 23, 25-27) In *Murdock*, plan fiduciaries used plan assets to acquire stock in two companies that one of the defendants controlled. This defendant then manipulated the combined stock holdings to "greenmail" the two companies, and used the "greenmail" to personally profit through premiums paid for the companies' stock. *Id.* at 1408. The Ninth Circuit held that the defendant could be ordered to disgorge his ill-gotten profits. *Id.* at 1418. The facts in *Murdock* have little to do with the facts upon which the Seventh Circuit's decision below was based. The Fund did not contend that FMA caused the Fund to engage in any improper investments from which FMA profited. Rather, the Fund sought and was denied disgorgement of FMA's reasonable, earned management fees. Nothing in *Murdock* would compel disgorgement of those management fees under § 409(a).

Even a cursory examination of the facts and holdings of *GIW*, *Lowen*, and *Murdock* reveals that the Fund's claim of a conflict between Courts of Appeals is ill-conceived.

V. The Seventh Circuit Properly Affirmed The District Court

The Seventh Circuit below correctly rejected the Fund's argument that the management fee received by FMA should be repaid under § 409(a)'s "profits" clause. The Seventh Circuit applied § 409(a)'s "profits" clause in a manner designed to effect precisely Congress's goal of providing a remedy for misuse of plan assets. The Seventh Circuit properly inquired whether FMA had used the Fund's assets for a purpose other than investing on behalf of the Fund or whether FMA invested those funds in a risky fashion to maximize its fee. (Pet. A-6) Because use of East West was the fiduciary breach the Fund alleged, the Seventh Circuit, in a passage from its opinion that the Fund studiously ignores, also inquired whether FMA earned a larger management fee by investing through East West. The answer, based on the District Court's findings, was no. Accordingly, the Seventh Circuit properly affirmed judgment for FMA.

The Seventh Circuit had no reason to consider awarding the Fund relief under § 409(a)'s equitable or remedial relief clause. The Fund did not rely on that clause in either the District Court or the Seventh Circuit[5] and has now waived any argument based on that clause.

---

5. The Fund's assertion that its claim that FMA must disgorge its earned, reasonable management fee "derived" in part from the equitable or remedial relief clause has absolutely no basis in the record. (Pet. 13)

The Fund wrongly argues that the Seventh Circuit had an "independent duty" to award the Fund relief under the equitable or remedial relief clause, even though never asked to do so by the Fund. The authority the Fund cites in support of this proposition (Pet. 22-24) is wrenched out of context and has no relevance to the present circumstances.

Moreover, the Fund's claim that FMA must pay the Fund an amount equal to its fee due to an alleged (and actually disproved) breach of fiduciary duty is not an equitable claim. The Fund has not identified a specific *res* to be recovered, nor has it sought to impose a trust over a specific asset. Rather, the Fund pressed a claim for money. Such a claim for money was described in *Great-West* as a claim for restitution at law. __ U.S. __, 122 S. Ct. 708, 714 (2002).

Further, the Fund admits that its proposed reading of the third clause of § 409(a) would render the second clause superfluous (Pet. 16-17), which is impermissible. *Mertens*, 508 U.S. at 257-58, 258 n.8, 113 S. Ct. at 2069-70, 2070 n.8. If a party is permitted to pursue restoration of alleged profits under the third clause – despite having tried and failed to prove its entitlement to such relief under the second clause – the second clause would be rendered redundant. Similarly, under the Fund's reading, the language of the profits clause requiring restoration of profits "made through use of assets of the plan" would be rendered utterly meaningless. Also, the term "other" equitable relief in the third clause of § 409(a) would be meaningless if it were to extend the same relief as the second clause.

Finally, relief under § 409(a)'s equitable or remedial relief clause is discretionary. The Fund's argument (Pet. 15-16) that "may" means "shall" in the clause "shall be

subject to such other equitable or remedial relief as the court *may* deem appropriate" is nonsensical. 29 U.S.C. § 1109(a) (emphasis added). The operative word, "may," is permissive. Although there is authority from this Court that "shall" could well mean "may," *e.g.*, *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9, 115 S. Ct. 2227, 2235 n.9 (1995) ("For example, certain of the Federal Rules use the word 'shall' to authorize, but not to require, judicial action. . . "), the Fund cites no authority to support the converse reading of the word "may."

CONCLUSION

FMA respectfully requests that the Fund's petition for issuance of a writ of certiorari be denied.

Respectfully submitted,

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No. 01-887

IN THE

Supreme Court of the United States

FRANK J. WSOL, SR., HUGH M. CORCORAN, ROBERT N. FALCO, NEAL J. LONDON, CHARLES SCHMALZ, PHILLIP STANOCH, AS TRUSTEES OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION LOCAL NO. 710 PENSION FUND, AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION LOCAL NO. 710 PENSION FUND,

Petitioners,

v.

FIDUCIARY MANAGEMENT ASSOCIATES, INC. AND EAST WEST INSTITUTIONAL SERVICES, INC.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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TREATISE

G. Bogert and G. Bogert, *The Law of Trusts and Trustees*, 543 (2d ed. 1978) 7,8

I. Introduction

A. Capsule Summary of the Fund's Allegations and the Appellate Court's Analytical Framework

Petitioners, the I.B.T. Local Union 710 Pension Fund and its trustees (together, the "Fund"), hired Respondent Fiduciary Management Associates, Inc. ("FMA") to manage a stock portfolio. FMA, in turn, retained East West Institutional Services, Inc. ("East West"), ostensibly to serve as an introducing broker on Fund trades. In reality, East West acted as a conduit to help divert Fund money (packaged as brokerage commissions) in a sophisticated, prearranged kickback scheme. The scheme enriched FMA, the Fund's fiduciary, and other co-conspirators, but not the Fund's participants or beneficiaries. FMA benefited because it would not have been retained to manage Fund assets had it not surreptitiously agreed to knowingly direct commissions to East West, which then paid off corrupt Fund trustees.

This is what the Fund claimed, at least, in levelling breach of loyalty and prohibited transaction charges against FMA below. And this is what the Seventh Circuit Court of Appeals *assumed* in its opinion despite denying the Fund any monetary relief under ERISA 409(a), 29 U.S.C. § 1109(a). The Seventh Circuit wrote:

> If the newly discovered evidence that the [Fund] unavailingly pressed on the district court in [its] Rule 60(b) motion is credited, *not only would FMA not have gotten the business had it not retained East West as an introducing broker,* but FMA knew about the crooked relationship between East West and one of the [F]und's trustees. *But that is just to say that if the evidence is believed, FMA committed a very serious breach of its fiduciary duty. Even so,* ... FMA obtained no greater profit than it would have

obtained had it not retained East West.

Wsol v. Fiduciary Management Associates, Inc., 266 F.3d 654, 658 (7th Cir. 2001) (emphasis added), reproduced at A-5 of the certiorari petition.[1]

B. The Fund's Reasons for Granting a Writ Remain Valid: the Presumed Fiduciary Malfeasance Enabled FMA's Profits or Fees

The Fund's certiorari petition rests on this overarching proposition: if FMA indeed "committed a serious breach" of its duty of loyalty and engaged in prohibited transactions as the Seventh Circuit assumed, then it must disgorge the profits or fees[2] it realized from managing the Fund's portfolio. The Fund believes the plain language of ERISA § 409(a), among other authorities, supports this "if-then" proposition.

FMA opposes the Fund's certiorari petition, but its brief strains to reach the merits of the Fund's position and largely disregards the Fund's policy arguments. FMA initially maintains the Fund mischaracterizes the Seventh Circuit's analysis because at one point (specifically, the preface to the questions presented), the Fund's certiorari petition states the Seventh Circuit "accepted [FMA's breaches] as fact." While

[1]By virtue of this assumption, the Seventh Circuit ignored liability and procedural issues, leaving only one issue for resolution:

> The [Fund's consolidated] appeals raise a number of questions, *but one is dispositive, and so we ignore the rest*. The [Fund] cannot prevail *unless the breach of fiduciary duty* either imposed a loss on the plan or generated a profit for FMA "through use of assets of the plan" by FMA. 29 U.S.C. § 1109(a). [Additional citations omitted.] If the former, they are entitled to damages, and, if the latter, to the recovery ("disgorgement," as the cases call it) of FMA's profit on a theory of unjust enrichment.... The [Fund has] not established a basis for either remedy, however, and so they lose.

Wsol, 266 F.3d at 656, A-2 (emphasis added). The italicized language also demonstrates the Court considered disgorgement of FMA's profits as a potential remedy.

[2]FMA's opposing brief does not commit or confine the Fund to an election of profits or fees. Accordingly, and with the Court's permission, the Fund continues to seek the maximum amount recoverable under ERISA § 409(a), be it FMA's profits or fees.

standing by the accuracy of this statement, the Fund nonetheless cured any unintended double meaning on multiple occasions. FMA also contends that the Fund waived reliance on the "equitable or other remedial relief" clause of ERISA § 409(a) — even though section 409(a) was not only repeatedly cited, but central to the parties' arguments and the lower courts' resolutions.

On the merits, FMA primarily argues that disgorgement of profits or fees is inappropriate because its fees were reasonable and legitimately earned. Put another way, it argues its fees were not causally connected to fiduciary breaches. But this position presupposes fiduciary fidelity. FMA does not account for the fiduciary breaches assumed by the Seventh Circuit, glossing over the assumption that it "[would] not have gotten the business had it not retained East West as introducing broker...." 266 F.3d at 658, A-5.

This assumption poisons the legitimacy of FMA's profits and fees and infects FMA's analysis, as well as the Seventh Circuit's holding.[3] Absent the unlawful *quid pro quo* arrangement, FMA would have been in no position to reap any profits and generate any managements fees by servicing the Fund's portfolio. But for its misconduct, FMA would not have been retained.

The presumed breaches thus *enabled* FMA's profits and fees, trumping its argument and obfuscating the fund's questions presented, which essentially can be reduced to this: Under ERISA § 409(a), must FMA disgorge the management fees paid by the Fund or the derivative profits because they would not have been realized *but for* FMA's assumed complicity in an unlawful *quid pro quo* arrangement?

FMA's other effort to cast the Seventh Circuit's decision as uniquely factual or fact-bound is overstated and poorly

[3]The Seventh Circuit's holding is infected because it is contradictory. It is illogical to presume liability predicated on the use of plan assets, yet deny recovery of FMA's profits or fees under ERISA § 409(a) because plan assets were not purportedly used to generate the profits or fees. In the Fund's view, FMA does not address this contradiction, which is amplified in the Fund's certiorari petition at pp. 14-15, much less reconcile it.

conceived: overstated because it relies on District Court findings to sanitize its conduct; poorly conceived because the appellate court assumed liability. The certiorari questions presented by the Fund are hardly fact-bound. While the Seventh Circuit did not *disturb* facts found by the District Court, as FMA correctly notes, it did not *affirm or uphold* the District Court's fact-finding, either, on anything relevant to the core disgorgement issues framed by the Fund in its certiorari petition.[4] As the Seventh Circuit itself put it, all other issues save the remedy question were "ignore[d]". *See* footnote 1, *ante*, *quoting* from *Wsol*, 266 F.3d at 656, A - 2.

Perhaps FMA suggests that similar facts are unlikely to be litigated again. This is hopelessly naive. Kickback schemes will exist for as long as competitors for business opportunities exist. Indeed, Congress dedicated an entire provision, ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3), to kickbacks. *See, also, Ossey v. Marolda*, 1998 WL 67624 (N.D. Ill.), a case with many parallels to this action, including, allegedly, a small brokerage firm's retention by corrupt trustees in exchange for kickbacks. (Because *Ossey* is unpublished, ten copies of the opinion, appropriately bound and labelled, have been given to the Clerk.)

II. The Fund Accurately Described the Seventh Circuit's Assumption

As previously noted, FMA quibbles over *three words* chosen by the Fund to describe the Seventh Circuit's hypothetical construct. Specifically, FMA faults the Fund for the following italicized words which preface the questions presented in the Fund's certiorari petition: "The Seventh Circuit *accepted as fact* that a fiduciary...knowingly collaborated in a sophisticated securities kickback scheme...." Frankly, the Fund remains hard-pressed to understand exactly how these words mislead or mischaracterize anything. The Seventh Circuit said what it said. As the Fund

[4] In the Fund's view, the facts left intact by the Seventh Circuit (as not "clearly erroneous") do not inform a "profits" inquiry under ERISA § 409(a). Rather, they relate to the question of "loss" under this same provision.

reads the opinion, the court assumed FMA's liability, *arguendo*, to reach the ERISA § 409 remedy issues.

The Fund fully appreciates that any attempt to skew the record is the surest way to sabotage even the most worthy certiorari issue. It stands to gain little, if at all, by quibbling in-kind. It suffices to say, then, that any innuendo FMA perceives from the Fund's "accepted as fact" reference should have been erased by *the very next sentence* which indicates the Seventh Circuit "presumed" fiduciary breaches. This accords with FMA's own opposition brief. Compare the Fund's certiorari petition at i ("[d]espite presuming fiduciary breaches, the court did not award any remedy") with FMA's opposition brief at 14 ("[w]hile the Seventh Circuit's opinion assumes, *arguendo* only, fiduciary breaches by FMA").

III. The Fund Did Not Waive Any Arguments

FMA believes the Fund waived any argument that disgorgement of profits or fees is authorized by the equitable or remedial relief clause of ERISA § 409(a). But to do so, FMA overlooks frequent citations to ERISA § 409(a) in the proceedings below. It forgets its own discussion of disgorgement in previous appellate briefs. (*See* appendices A & B to this reply brief, paginated as A-R-1, *et seq.* and B-R-1 to distinguish the Fund's original appendix.) And FMA glosses over the Seventh Circuit's references to disgorgement and constructive trusts as alternative remedies against a malfeasant fiduciary. *Wsol*, 266 F.3d at 656, A - 2.

FMA's waiver contention thus belies the parties' arguments and the Seventh Circuit's own understanding of them. In this vein, *Harris Trust and Savings Bank v. Salomon Smith Barney*, 530 U.S. 238 (2000), proves instructive. Dismissing a waiver argument this Court wrote: "But even assuming that petitioners did not pellucidly articulate this theory before the Seventh Circuit, it appears to us that the Seventh Circuit understood the tenor of the argument...." *Id.* at 245, n. 2.

Regardless, FMA is legally wrong to suggest that a party may never offer new statutory *emphasis* or vary appellate arguments. The Fund's certiorari petition elaborates upon the

statutory authorization for disgorgement of profits or fees by parsing the "equitable or remedial relief" clause of ERISA § 409(a), the remedial statute which has always been, and remains, the centerpiece of the Fund's position. The focus on this clause may now be more refined, but the clause, as part of ERISA § 409(a), is not new authority.[5] Case law teaches that a party relying on a statute below is not barred from asserting new applications of the statute on appeal. *See, Chase Nat'l Bank v. U.S.*, 116 F.2d 625, 627-28 (2nd Cir. 1940). As this Court has instructed, "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 510, 534 (1992)(citations omitted). This rule makes perfect sense. "Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived." *U.S. v. Speers*, 382 U.S. 266, 277, n. 22 (1965)(electing to address the merits of a litigant's statutory comparison), *quoting U.S. v. Fisher*, 2 Cranch 358, 386 (1805) (Marshall, C.J.). Notably, FMA's brief fails to identify a single authority for its waiver argument.

Finally, close examination exposes faulty underpinnings for FMA's waiver argument. In their briefs to the Seventh Circuit, the parties never debated (and FMA never contested) the proposition that profits or fees causally connected to a demonstrable fiduciary breach and the use of plan assets should be restored under ERISA § 409(a). Rather, FMA *denied committing a fiduciary breach* (*i.e.*, the predicate act to any relief): its compensation was earned because of skillful portfolio management, not because of a *quid pro quo* arrangement calling for kickbacks in exchange for the Fund's business. (*See*, appendix A to this reply brief.) Alternatively, it denied receiving compensation from the Fund that was

[5]Moreover, the Fund's certiorari petition argues that FMA's assumed breaches trigger relief under the restoration of profits clause of ERISA § 409(a), as well as the "equitable or remedial" clause. *See*, 29 U.S.C. § 1109(a) which states in part: "[A breaching fiduciary] shall...restore to such plan any profits of such fiduciary which may have been made through use of assets of the plan by the fiduciary...." *Ibid.*

causally connected to any fiduciary breach, the use of plan assets, or both. (*Ibid.*)

Because restoration of profits causally connected to fiduciary breach and the use of plan assets was uncontested, the Seventh Circuit — which assumed both FMA's malfeasance and, apparently, a causal connection linking that malfeasance to FMA's profits — framed a profits issue the Fund could not have fully anticipated. In particular, the Seventh Circuit itself asked and answered whether profits are recoverable under ERISA § 409(a) if plan assets are not appropriated or invested in a risky scheme to enhance fees. The Fund deserves the opportunity in its certiorari petition to brief an issue first raised by the Seventh Circuit in its opinion, and the cases discussed above grant one.

IV. Conclusion

Stripped of diversions such as waiver and misrepresentation accusations, FMA's core argument seems to attribute some or all of the Fund's investment gains to the services it provided as an asset manager. Accordingly, FMA reasons, it is entitled to keep its profits and fees. This approach, of course, not only downplays contemporaneous bull market conditions, but it interposes economics as justification for its *presumed fiduciary misconduct.* This is akin to the ends justifying the means.

In the Fund's view, FMA's position rests on a legal/economic approach evidently embraced by the Seventh Circuit. This approach is not an adequate template for every case. It fails to account for human variables and dynamics. It is particularly wanting if, as here, *it fails to deter serious fiduciary misconduct* which causes incalculable, but certainly no less insidious, harm than that suffered by litigants with measurable economic loss. *See, Amalgamated Clothing and Textile Workers Union v. Murdock*, 861 F.2d 1406, 1411 (9th Cir. 1988)(disgorgement is ordered "to deter the fiduciary from engaging in disloyal conduct", the objective being "to make 'disobedience...so prejudicial...he and all other[s]...will be induced to avoid disloyal transactions in the future'")(*quot-*

ing G. Bogert and G. Bogert, *The Law of Trusts and Trustees*, § 543, at 218 (2d ed. 1978).

In the final analysis, Justice Jackson's words in *Mosser v. Darrow*, 341 U.S. 267 (1951), quoted in the Fund's certiorari petition at page 29, again bear on the questions presented:

> [I]t is difficult to say that there was no injury to the estate of the trust through these transactions. But equity has sought to limit difficult and delicate fact-finding tasks concerning its own trustee by precluding such transactions for the reason that their effect is often difficult to trace, and the prohibition is not merely against injuring the estate — it is against profiting out of the position of trust.

341 U.S. at 273.

FMA's opposition and the Seventh Circuit's decision represent an economics approach gone awry. Even if economics properly inform the analysis, the approach fails because the Fund paid FMA for loyalty. At the very least, isn't the Fund entitled to an economic remedy for FMA's assumed disloyalty?

For these reasons, the Court is respectfully urged to grant the Fund's Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 01-887

IN THE

Supreme Court of the United States

FRANK J. WSOL, SR., HUGH M. CORCORAN, ROBERT N. FALCO, NEAL J. LONDON, CHARLES SCHMALZ, PHILLIP STANOCH, AS TRUSTEES OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION LOCAL NO. 710 PENSION FUND, AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION LOCAL NO. 710 PENSION FUND,

Petitioners,

v.

FIDUCIARY MANAGEMENT ASSOCIATES, INC. AND EAST WEST INSTITUTIONAL SERVICES, INC.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITIONERS' REPLY MEMORANDUM

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Appendix A

Excerpt from Respondent Fiduciary Management Associates, Inc.'s brief to the Seventh Circuit in Case No. 00-2703, styled Frank Wsol, Sr., et al., v. Fiduciary Management Associates, Inc. and East West Institutional Services, Inc.

From pp. 32-34

E. FMA Did Not Profit From its Use of E-W

The Teamsters claim entitlement to disgorgement of FMA's "profits" in the form of FMA's management fees, pursuant to ERISA Section 409, 29 U.S.C. § 1109. This argument is wrong as a factual matter. The District Court found no self-dealing as a finding of fact. (Teamsters Apndx. 20-29)

The Teamsters are also legally wrong because FMA's receipt of management fees bore no causal relationship to any alleged self-dealing by FMA. Section 409 of ERISA states, in pertinent part, that a fiduciary may be liable "to restore...any profits of such fiduciary which have been made through use of [plan] assets...by the fiduciary." 29 U.S.C.§ 1109. In interpreting Section 1109, this Court has emphasized if defendant fiduciaries' profits "resulted from defendants' own efforts, it in no way belongs to the trust." *Leigh v. Engle*, 858 F.2d 361, 366 (7th Cir. 1988).

The evidence established that all of FMA's management fees resulted from FMA's own efforts, not from FMA's decision to use E-W as an introducing broker. The testimony of various trustees established that FMA was hired and retained by the Teamsters on the merits of FMA's qualifications and performance record. (*E.g.*, Trustee Corcoran, Tr. 621-22; Trustee London, Tr. 741-42) This testimony supports the District Court's finding, as a fact, that the Teamsters' "trustees made their own independent decision to retain FMA." (Teamsters Apndx. 23) Similarly, there was no evidence E-W had influence over FMA's receipt of management fees. FMA earned its fees. Accordingly, even if there were self-dealing by FMA — and there was not — the Teamsters failed to

establish the requisite causal link between the alleged self-dealing by FMA and FMA's "profits."

The Teamsters rely on two District Court cases, *Ossey v. Marolda*, 1998 U.S. Dist. LEXIS 1767 (N.D.Ill., January 29, 1998), and *Wsol, et al. v. Great Northern Asset Management*, 114 F. Supp. 2d 720 (N.D. Ill. 2000). (Teamsters Br. 46) These cases are wholly distinguishable.

First, both *Ossey* and *Great Northern* were decisions in which the District Courts merely denied the defendant investment managers' motions for summary judgment because of material factual disputes. (*Id.*) Here the factual disputes have been resolved in a trial.

Second, in both *Ossey* and *Great Northern*, the plaintiffs raised a factual question about whether the defendant money managers received management fees because of improper influence on plan trustees. *Ossey*, 1998 U.S. Dist. LEXIS at *3-4; *Great Northern*, 114 F.Supp.2d at 724. Here, conversely, the evidence at trial showed that FMA earned its management fees only as a result of its own efforts, and E-W had nothing to do with the full Teamsters Board of Trustees' decision to hire and retain FMA.

Third, in *Ossey* and *Great Northern* the defendant investment manager's selection of the broker appeared to be contrary to its usual business practices. *Ossey*, 1998 U.S. Dist. LEXIS at *16; *Great Northern*, 114 F.Supp2d at 724-25. Here, by contrast, FMA acted consistent with its form ADV. Further, FMA's witnesses testified that FMA used introducing brokers other than E-W. (Tr. 286; 298)

Finally, in both *Ossey* and *Great Northern* there was evidence that the use of the broker either caused the plan loss or placed plan assets at risk. In *Ossey*, the broker was used to clear and execute trades, jeopardizing best execution. *Ossey*, 1998 U.S. Dist. LEXIS at *7-8. In *Great Northern*, the District Court accepted, for summary judgment purposes, the plaintiffs' experts' conclusion that the Teamsters obtained a worse price for fixed income products when E-W was used. *Great Northern*, 114 F.Supp.2d at 725. Here, by contrast to

Ossey and *Great Northern*, FMA never used E-W for clearance and execution, nor did the Teamsters suffer any loss. Accordingly, the Teamsters failed to establish that FMA profited from alleged self-dealing.

Appendix B

Excerpts from Respondent Fiduciary Management Associates, Inc.'s brief to the Seventh Circuit in Case No. 01-1685, styled Frank Wsol, Sr., et al., v. Fiduciary Management Associates, Inc. and East West Institutional Services, Inc.

From p. 17

...Nor does the Roach Declaration contain any facts that would entitle the Teamsters to a disgorgement of FMA's "profits" in the form of FMA's management fees.

From p. 39

Similarly, the Roach Declaration does nothing to enhance the Teamsters' claim that they are entitled to disgorgement of FMA's "profits" in the form of FMA's management fees, pursuant to ERISA Section 409, 29 U.S.C. § 1109.